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In The

Supreme Court of the United States

October Term, 1979

No. 79-1640

BOROUGH OF MOUNT EPHRAIM,

Respondent,

vs.

JAMES F. SCHAD, 613 CORPORATION and JULIETTE ANN DI LUCIANO,

Appellants/ Petitioners.

APPEAL FROM SUPREME COURT OF NEW JERSEY ON JURISDICTIONAL STATEMENT

and

PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF NEW JERSEY

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 13(2) and 15 of the Rules of the Supreme Court of the United States, appellants James F. Schad, 613 Corporation and Juliette Ann Di Luciano, file this statement of the basis upon which it is contended that the Supreme Court of the United States had jurisdiction to review the order entered by the New Jersey Supreme Court in this case and should exercise such jurisdiction herein. Alternatively, James F. Schad, 613

Corporation and Juliette Ann Di Luciano, the petitioners herein, pray that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey entered in the above-entitled case on January 18, 1980.

OPINIONS BELOW

The defendants, charged in the Borough of Mount Ephraim Municipal Court with a use of the premises of 613 Corporation for live nude dancing in violation of the Borough's Zoning Ordinance 99-15B (which purports to proscribe all forms of live entertainment throughout the Borough) objected that the ordinance was constitutionally infirm for a number of reasons. The defendants contended that the ordinance worked an impermissible prior restraint on and suppression of freedom of expression guaranteed by the First and Fourteenth Amendments to the United States Constitution. In addition, the defendants contended that the ordinance, in its application, was not rationally related to the legitimate objectives of zoning, that it was arbitrary and discriminatory, that it lacked clarity, and that it was overbroad and it, thereby, offended the due process and equal protection guarantees of the Fourteenth Amendment to the United States Constitution. The defendants' contentions notwithstanding, they were convicted by the municipal court. The Camden County Court, trying the defendants *de novo* on the record made in the municipal court determined that the zoning ordinance was a reasonable exercise of the police power and that it was not directed to any infringement on the constitutionally protected rights of the defendants. Accordingly, the Camden County Court similarly found the defendants guilty. The Superior Court of New Jersey, Appellate Division, affirmed the judgment of the Camden County Court essentially for the reasons expressed by it in its opinion.

JURISDICTION

On January 18, 1980, the Supreme Court of New Jersey entered separate orders dismissing the defendant's appeal from and denying their petition for certification to the Superior Court of New Jersey, Appellate Division.

The Supreme Court of the United States has jurisdiction to review the final judgment by direct appeal pursuant to 28 U.S.C. §1257(2).

The Supreme Court of the United States has jurisdiction to review the final judgment on a petition for certiorari pursuant to 28 U.S.C. §1257(3).

Decisions thought to sustain jurisdiction include *Fiske v. Kansas,* 274 U.S. 380 (1927) and *Torcaso v. Watkins,* 367 U.S. 488 (1961).

ORDINANCES AND CONSTITUTIONAL PROVISIONS INVOLVED

Borough of Mount Ephraim Zoning Ordinance 99-15B provides:

> "B. Principal permitted uses on the land and in buildings.
>
> (1) Offices and banks; taverns; restaurants and luncheonettes for sit-down dinners only and with no drive-in facilities; automobile sales; retail stores, such as but not limited to food, wearing apparel, millinery, fabrics, hardware, lumber, jewelry, paint, wallpaper, appliances, flowers, gifts, books, stationery, pharmacy, liquors, cleaners, novelties, hobbies and toys; repair shops for shoes, jewels, clothes and appliances; barbershops and beauty salons; cleaners and laundries; pet stores; and nurseries. Offices may,

in addition, be permitted to a group of four (4) stores or more without additional parking, provided the offices do not exceed the equivalent of twenty percent (20%) of the gross floor area of the stores.

(2) Motels."

Borough of Mount Ephraim Zoning Ordinance 99-4 provides:

"§99-4. Prohibited uses.

All uses not expressly permitted in this chapter are prohibited."

First Amendment to the Constitution of the United States:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fourteenth Amendment to the Constitution of the United States:

"Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED

Whether a municipality may, without violation of the defendants' federal constitutional guarantees of free speech and expression, due process and equal protection, impose criminal penalties for the violation of its zoning ordinance which ordinance purports to proscribe all forms of live entertainment within the municipality's boundaries.

STATEMENT OF THE CASE

A. Statement of the Facts

The essential facts are simply stated. In June of 1973, the defendants opened for business in a commercial zone in the Borough of Mount Ephraim, offering for sale, at retail, various books, magazines and films. Shortly after its commencement of business, 613 Corporation obtained amusement licenses for the operation of a number of coin-operated devices. Each of the devices consisted of a booth in which a film is shown upon the patron's insertion of a coin. In July of 1976, the defendants commenced to offer an additional form of amusement. That second form of amusement consisted of a booth with an opaque glass panel. Upon the patron's insertion of a coin, the panel became clear which enabled the patron to view a dancer — usually nude — performing beyond the glass. It is the Borough's contention that the defendants' conduct, in offering that second form of amusement, violated its zoning laws and made them subject to criminal penalties.

B. Procedural History

This action began with complaints by the Borough of Mount Ephraim charging James F. Schad, 613 Corporation and Juliette Ann Di Luciano with the use of the premises of 613 Corporation for a use contrary to the provisions of Borough of Mount Ephraim Zoning Ordinance 99-15B. In that proceeding, the defendants filed a brief in support of their motion to dismiss the complaints. In their brief, the defendants argued that the

Borough's interpretation of its ordinance and the application of the ordinance to them violated the defendants' rights secured by the First and Fourteenth Amendments to the United States Constitution. Specifically, the defendants contended that the activity to which the Borough objected — live nude dancing — was expression presumptively protected by the First Amendment. Further, the defendants contended that the Borough's ordinance (which the Borough interpreted to proscribe live entertainment throughout its boundaries) attempted to suppress rather than regulate presumptively protected expression and that the ordinance was unduly vague and overly broad. The brief further contended that the ordinance offended the requirements of due process and equal protection in that, in its application to the defendants, it was unreasonable and arbitrary. The municipal court specifically determined that the defendants' activity was not protected by the First Amendment and impliedly determined the balance of the issues raised by the defendants against them in its decision on June 2, 1978. Each of the defendants were found guilty and sentenced to pay a fine of $300.

The defendants filed a timely notice of appeal with the Camden County Court on June 13, 1978. A trial *de novo* was had on the record made in the municipal court to include the briefs filed with that court. The Camden County Court determined that, although live nude dancing is protected by the First Amendment ". . . First Amendment guarantees are not involved in this matter." It further determined that ". . . there has been no distinction without reason by the Municipality and that the permitted uses under the Zoning Ordinance is a reasonable exercise of police power and that the Zoning Ordinance is not directed to any infringement on the constitutionally protected rights." Impliedly rejecting the balance of the defendants' contentions, the Camden County Court found each of them guilty as charged and sentenced each of them to pay a fine together with costs. An order to that effect was entered on November 3, 1978.

On November 24, 1978, the defendants filed their notice of appeal from their conviction in the Camden County Court with the Superior Court of New Jersey, Appellate Division. On appeal, the defendants contended that their convictions were violative of their First and Fourteenth Amendment guarantees. The Appellate Division affirmed the defendants' convictions on October 17, 1979 for the reasons expressed by the Camden County Court.

On November 5, 1979, the defendants filed both a notice of appeal for certification and a notice of appeal to the Supreme Court of New Jersey. The defendants sought review on grounds which included their contention that their convictions were violative of the First and Fourteenth Amendment guarantees. On January 18, 1980, the New Jersey Supreme Court entered an order denying the defendants' petition for certification and dismissing their appeal.

SUBSTANTIALITY OF FEDERAL QUESTIONS OR, ALTERNATIVELY, REASONS FOR GRANTING THE WRIT

The speech protected by the First Amendment to the United States Constitution is not, of course, limited to the written or spoken word. Live performances and dance are afforded broad prima facie protection. *See, e.g., Schact v. United States,* 398 U.S. 58 (1970). Even barroom-type nude dancing is presumptively entitled to the protection of the First Amendment. *Young v. American Mini Theatres, Inc.,* 427 U.S. 50 (1976); *Doram v. Salem Inn, Inc.,* 422 U.S. 922 (1975); *California v. LaRue,* 409 U.S. 109 (1972). Any attempt to restrict the exercise of First Amendment liberties must be justified by clear public interest. The rational connection which in some other context might support legislation against attack on due process grounds, will not suffice here. *Thomas v. Collins,* 323 U.S. 516 (1945), *reh. den.,* 323 U.S. 819 (1945). Accordingly, governmental regulation which limits First Amendment freedoms is justified only if the regulation is within the constitutional power of the government; if it furthers an

important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *United States v. O'Brien,* 391 U.S. 367 at 377 (1968). *See also, Young v. American Mini Theatres, Inc.,* 427 U.S. 50 at 81 (1976). Even if the governmental purpose of the regulation is shown to be appropriately legitimate and substantial, the regulation cannot be sustained on attack if that regulation employs means that "broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Keyishian v. Board of Regents of U. of St. of N.Y.,* 385 U.S. 589 at 601 (1967).

The Borough, of course, is constitutionally empowered to enact zoning ordinances. However, the Borough has not attempted to identify the interest which is served by its blanket ban on live entertainment. Certainly, it has not attempted to establish that that interest, whatever it may be, is a compelling substantial, subordinating, paramount, cogent or strong interest. As opposed to the Borough's ordinance being unrelated to the suppression of free expression, suppression seems to be its only effect. Instead of embodying narrowly drawn standards closely related to the unidentified interest, the Borough's regulation blindly swings a heavy club knocking down everything in its path.

Further, governmental regulation must be accomplished by methods consistent with due process. The guarantee of due process demands that a regulation be based upon some factor having a proper relation to the purpose of the control. Due process and equal protection further require that classifications made by the regulating body will not be unreasonable, arbitrary or capricious. *Allied Stores of Ohio, Inc. v. Bowers,* 358 U.S. 522 (1959). New Jersey's law is clearly in accord. *Rockhill v. Chesterfield Township,* 23 N.J. 117 (1957); *Schmidt v. Board of Adjustment of City of Newark,* 9 N.J. 405 (1952). The maintenance of coin-operated amusement devices, each of which consists of a booth in which a short sexually-explicit film is

shown upon the patron's insertion of a coin, is a permitted use of the defendants' property. The second form of amusement sought to be introduced by the defendants likewise consists of a booth and is activated by the patron's insertion of a coin. Rather than causing a film to be projected on a screen, the insertion of the coin, in the second form of amusement, causes an opaque glass panel to become clear enabling the patron to view a usually nude dancer beyond the glass. The Borough has taken the position, and the New Jersey courts have sustained the Borough's position, that the second form of amusement is a use which is neither permitted nor accessory to the principal use. The first and second forms of amusement are so similar in their operation and character to be, for the purposes of zoning, indistinguishable. There is nothing about the second which is, in the least, any more inimical to the purposes of the Borough's zoning ordinance than the first. The Borough, in interpreting its zoning ordinance, has sought to exclude a use so similar to a permitted use that the two uses are in effect indistinguishable. The exclusion is patently discriminatory and arbitrary and offensive to the guarantees of due process and equal protection.

The vagueness, overbreadth and oppressive effect on First Amendment freedoms of the Borough's zoning regulation are abundantly clear. Just as clear, is the arbitrariness of the Borough's application of its ordinance to the conduct of the defendants which led to their prosecution. The invalidity of the ordinance and the impropriety of its application to the defendants are patent. This Court should review the convictions of the defendants in order to forestall the proliferation of the practice by municipalities of utilizing loose interpretations of zoning ordinances to effectively suppress expression protected by the First Amendment. It is respectfully submitted that this Court should further review the convictions of the defendants in order to vindicate their rights secured by the Federal Constitution but denied to them by the judgment below.

CONCLUSION

For the foregoing reasons and based upon the foregoing authorities, the defendants submit that this Court should take jurisdiction of this appeal, or, alternatively, pray that a writ of certiorari issue from this Honorable Court to review the judgment of the Supreme Court of New Jersey. In the event that jurisdiction is accepted or that the petition is granted, defendants pray that the zoning ordinances of the Borough of Mount Ephraim, as applied to them, be declared constitutionally invalid and that their convictions be reversed.

Respectfully submitted,

s/ Robert E. Levy

LEVY AND ROBERTSON
Attorneys for Appellants/ Petitioners

APPENDIX

OPINION OF CAMDEN COUNTY COURT

CAMDEN COUNTY COURT
CRIMINAL
ON APPEAL 123-77

BOROUGH OF MOUNT EPHRAIM,

Plaintiff

VERSUS

JAMES F. SCHAD, DENNIS C. FAVEN,

SIX THIRTEEN CORPORATION, JULIETE ANN DI LUCIANO,

Defendants

September 21, 1978

BEFORE: HONORABLE NEIL F. DEIGHAN, JR., J.C.C.
CAMDEN COUNTY COURTHOUSE

APPEARANCES: ARNOLD N. FISHMAN, ESQUIRE

ROBERT E. LEVY, ESQUIRE

Reported by:

JEAN M. PETRUZZI, C.S.R.

THE COURT: Gentlemen, this is an appeal from four complaints of the Borough of Mount Ephraim Municipal Court. 392 is against the defendant, Faven for violation of an

ordinance, ordinance number 99-2.J concerning the painting of a sign by that defendant. Complaint 391 against the defendant James F. Schad was dismissed. But as against Faven, he was found guilty and ordered to pay a fine of seventy-five dollars. Complaint 393, 394, and 395 are against the defendants, Six Thirteen Corporation, James F. Schad, and Juliete Ann DiLuciano, all of whom are charged respectively with using the premises at Six Thirteen Black Horse Pike, Mount Ephraim, New Jersey for live nude dancing. On complaints 393, 394, and 395, the respective defendants were found guilty of violation of zoning ordinance 99-15B and a fine of three hundred dollars was imposed against each of the defendants.

The matter was initally tried before the Municipal Court of the Borough of Mount Ephraim on a stipulation of facts as follows:

1. Defendant opened for business at its present location in a C Zone in the Borough of Mount Ephraim in June, 1973.

2. From its inception, defendant exposed for sale adult books, magazines and paraphenalia as well as having coin-operated movie peep shows.

3. In July, 1976, defendant commenced offering live nude dancing.

5. Also, in July, 1976, defendant obliterated the legend from its existing non-conforming sign without obtaining a permit.

6. The Judge will view the defendant's activities in question of the stipulation that what he sees is substantially similar to what he would have seen on the dates alleged in the pending Complaints.

It was also stipulated that the following issues were to be decided by the Municipal Court.

Opinion of Camden County Court

1. Is live entertainment permitted under the Zoning Ordinances of the Borough of Mount Ephraim in a C Zone?

2. Is defendants' live nude dancing protected by the First Amendment?

3. Has the Borough of Mount Ephraim engaged in selective enforcement of its Zoning Ordinances?

4. May defendant place a new Legend upon its obliterated non-conforming sign advertising live nude dancing?

5. Must the defendant secure a permit to repaint the sign with a new legend?

6. May the defendant replace the old legend from its obliterated non-conforming sign?

7. Must the defendant secure a permit to return the old legend?

At the hearing additional testimony was taken of Albert Tovinsky, the Building Inspector; and the Chief of Police, Joseph Graham. He was requested to produce excerpts of the Zoning Ordinance of the Borough of Mount Ephraim which had been amended in 1973.

The Building Inspector was only familiar with the recent Zoning Ordinance, having taken office in 1974.

He said there were no prior records concerning Zoning Ordinances. He said that the Zones are essentially single family, residential, single family townhouse garden apartments and commercial. He said that the Zoning Ordinance does not allow adult and an adult motion picture theater, nor does it provide for a dance hall, pool room, billiard parlor or bowling allies.

Opinion of Camden County Court

Apparently the defendant was attempting to establish selective enforcement of the Ordinance and much of the transcript of the hearing is concerned with colloquy between counsel and the court. At any rate, it was established that a place called Capriotti's is in the commercial Zone C. The Building Inspector knew nothing about six amusement licenses issued to Capriotti's, the Mount Ephraim Democrat Club, Spread Eagle Inn, but admitted that the Zoning Ordinance does not provide for amusement or entertainment. The Mount Ephraim Democratic Club, the Spread Eagle Inn, and an establishment known as Guiseppi's are all located in the commercial zone and he did not know whether the Borough issues entertainment licenses. He heard of an establishment called My Dad's, which is located in the commercial zone and again, had no knowledge concerning licenses, although he said that they do have live entertainment which is not permitted under the Zoning Ordinance. He said that they had live entertainment from the late or early fifties and that another establishment known as Al-Jo's has live entertainment, and is in Zone C, but goes back to the same period of time. He said that non-conforming uses are permitted under the ordinance and indicated that these were non-conforming uses in so far as live entertainment is concerned. He said he was informed that non-conforming uses would be permitted to continue. He testified that music was the entertainment offered at My Dad's and they some times have vocalists, and that there was a band at Al-Jo's.

He also said that he had no knowledge of anyone having action taken against him for providing amusement or entertainment in the Borough of Mount Ephraim. He said that Bingo is offered in the Borough. And apparently the contention was that Bingo is live entertainment. But, at any rate, the witness Tovinsky, had no knowledge concerning the operation and establishment of Bingo. And admitted that he was familiar with permitted uses of C Zone. He issued the complaint concerning nude dancing after consultation with the Police Chief, Graham, the Borough Commissioners and the Borough Solicitor. He said

that the Building Inspector's office had no prior records concerning the Zoning Ordinances. He said that Six Thirteen Corporation has a license to operate peep shows and that the present complaint was not directed towards the peep shows. All of the other business establishments were doing business as far back as 1957, as far as he could remember.

On behalf of the defendant, Police Chief Joseph Graham testified that My Dad's, Club Al-Jo, and Capriotti's and Six Thirteen Corporation are the only ones that have live entertainment within the Borough. He said that the three establishments other than Six Thirteen had live entertainment since 1948.

As to the violation concerning the sign, the defendant points out that the Borough of Mount Ephraim adopted in 1970 the BOCA basic building code and further that pursuant to article 14 of that code repainting or reposting a display matter shall not be deemed an alteration. The Municipality contends that by painting over the old legend it is an indication of an intentional abandonment. It is also contended that this required information of the Municipality and also the permission to repaint the sign.

It is the finding of this Court that the changing of the legend on the existing sign is in no way an abandonment by the defendant of any non-conforming use of the sign. Further, it would appear that as to the repainting of the sign does not require a new permit or license. The purpose of repainting of the sign was to advertise nude entertainment.

It is the opinion of the Court that the defendants had the right to repaint the sign but that if the advertising was false, it is of no concern in this matter. Therefore, the finding of the defendant Faven guilty of violating section 99-26J of the Zoning Ordinance is reversed. And it is the determination that the defendant is not guilty of this ordinance. And the fine, if paid, shall be returned to the defendant.

More specifically to answer the issues stipulated the Court finds as follows:

4. May defendant place a new legend upon its obliterated non-conforming sign advertising live nude dancing? Yes.

5. Must defendant secure a permit to repaint the sign with a new legend? No.

6. May defendant replace the old legend from its obliterated non-conforming sign? Yes.

7. Must defendant secure a permit to return the old legend? No.

There remains the first three questions concerning live nude dancing and enforcement of the Zoning Ordinances. These three questions, together with the answers are as follows:

1. Is live entertainment permitted under the Zoning Ordinances of the Borough of Mount Ephraim in a C Zone? No.

2. Is defendants' live nude dancing protected by the First Amendment? Yes, but not in this case.

3. Has the Borough of Mount Ephraim engaged in selective enforcement of its Zoning Ordinances?

No, As to the third question, there simply has not been set forth any factual basis to prove that the Municipality is engaged in selective enforcement of its ordinance.

The defendants under point 3 of their memorandum set forth law on selectivity and gives discriminatory application of the local ordinance.

There are no facts before the Court to indicate selectivity or discriminatory enforcement. And therefore there is no question

to be resolved concerning the Constitutional aspects of the Equal Protection Clause as argued by the defendants.

There has been testimony concerning Capriotti's, Mount Ephraim Democratic Club, the Spread Eagle Inn, Guiseppi's, My Dad's, and Al-Jo, but it would appear from the testimony that any live entertainment in these establishments would be a non-conforming use under the Zoning Ordinance. Therefore, there is no proof of any selectivity or discriminatory conduct by the Borough.

Section 99-15 of the Zoning Ordinance of the Borough of Mount Ephraim deals with Class C commercial districts and subsection A from the record below and subsection B from the record below as to commercial districts provides as follows:

> "B. Principal permitted uses on the land and in buildings.
>
> (1) Offices and banks; taverns; restaurants and luncheonettes for sit-down dinners only and with no drive-in facilities; automobile sales; retail stores, such as but not limited to food, wearing apparel, millinery, fabrics, hardware, lumber, jewelry, paint, wallpaper, appliances, flowers, gifts, books, stationery, pharmacy, liquors, cleaners, novelties, hobbies and toys; repair shops for shoes, jewels, clothes and appliances; barbershops and beauty salons; cleaners and laundries; pet stores; and nurseries. Offices may, in addition, be permitted to a group of four (4) stores or more without additional parking, provided the offices do not exceed the equivalent of twenty per cent (20%) of the gross floor area of the stores."

It is apparent from reading the permitted uses that live entertainment whether it be nude or otherwise, is not permitted.

Opinion of Camden County Court

As has been heretofore stated, live entertainment in other establishments constitute non-conforming uses.

The violations concerned in this matter occurred on July 21, 1976 and the defendant, Six Thirteen Corporation opened for business at its present location in a C commercial district in June, 1973, and since that date has engaged in the sale of adult books and magazines and other articles as well as coin-operated peep shows. The present Zoning Ordinance was adopted in 1973. Therefore, Six-Thirteen Corporation could not acquire a prior non-conforming use.

The defendants contend that live nude dancing is protected by the First Amendment. The Municipal Court held that live nude dancing is not protected under the First Amendment citing the cases of Portland v. Derrington and Schneider v. State.

This Court has held that live nude dancing is protected by the First Amendment but it is the opinion of this Court that the First Amendment guarantees are not involved in this matter. In the Case of Adams Newark Theater Company versus Newark, 22 NJ472 1956, the Supreme Court of New Jersey recognized that the presentation of moving pictures and stage shows come within the protective ambit of the constitutional right of free speech. Adams involved the legality of certain ordinances condemning lewdness, obscenity or indecency. The Supreme Court went on to recognize however, that this liberty was not absolute.

It states, "recent decisions make it plain that the presentation of moving pictures and stage shows definitely comes within the protective ambit of constitutional free speech. While this liberty is extensive and is usually ardently defended by the courts, it is by no means absolute. Inroads and restrictions are permitted under the aegis of the police power of the states, which may be delegated to subordinate governmental bodies." 22 N.J. at 475. The limitation which the Court places on the conduct is that it may not be obscene. Adams at 476.

The Federal courts have also directed attention to nude dancing as an aspect of the first amendment within a variety of factual situations. California v. LaRue, 409 U.S. 109 34 Ed. 2d 342, 93 Supreme Court 390 (1972) presents the interrelationship of the First and Twenty-first amendments. In LaRue the California Dept. of Alcholic Beverage Control passed regulations prohibiting nudity in licensed bars. The regulations survived a First Amendment attack.

The subject matter as contended by the Defendant is annotated in 49 ALR 3d 1084 "Nude entertainment as a public offense." Without exception the cases in the annotation have arisen in context with obscenity law violations or related infractions, rather than within a Zoning Law context. The present case does not involve any law or ordinance regulating or restricting obscenity or nude dancing as such and is not involved with any moral issue. The present case is involved solely with whether nude dancing is a permitted use under the Zoning Ordinance. And the answer to this is obviously "No". Therefore, the conduct of nude dancing would violate the Zoning Ordinance.

The defendants attempt to relate this Zoning Ordinance violation to a Constitutionally protected right. Point III of the brief deals with restraining the Municipality from selective and discriminatory application of the ordinance. It has heretofore been determined that there are no facts to support a context of selectivity and discriminatory application of the Zoning Ordinance. Aside from this which this matter involves a quasi-criminal proceeding it is not a Chancery proceeding to restrain the Municipality from enforcing its Ordinance.

Under point IV the defendants content that their prior undisturbed use of the premises denotes a compliance with all Municipal Ordinances. While this may be so, it does not give them the privilege to conduct live entertainment in violation of the Ordinance. Under point V the defendants contend that the Municipality has drawn a distinction without reason. Under

point VII they contend that the exercise of police power must be reasonable and must have some relation to the purpose of the control under point VIII they contend that Zoning Ordinances may not be used for supression of First Amendment material. Under point IX they contend that the Zoning Ordinance is Constitutionally invalid, in that it prohibits communicative material in all zones.

In a supplemental brief the defendants contend that the Borough has failed to establish that other enterprises offering live entertainment constitute non-conforming uses. In this respect, the undisputed facts are that in the other establishments having live entertainment, the live entertainment anteceded the 1973 Zoning Ordinance by many many years. In a supplemental letter memorandum the defendants contend that live entertainment is an accessory use to the present permitted uses. This contention is based upon a determination by the Municipal Court that Municipal groups in restaurants and taverns is an accessory function to the tavern or restaurant but that live nude dancing is not an accessory use to a book store or even an adult bookstore.

This Court makes no determination concerning accessory uses but it should be pointed out that in addition to a finding that the use is incidental to the main use, it must also be found that the use must be a customary use.

Penn State versus PT&L Construction Company, Inc., 77 N.J. 20 (1978) and there is no proof of a custom.

There's no question but a Municipality may enact ordinances and Zoning Ordinances under the Police Power and that the Ordinance must bear a substantial relation to public health, safety, morals, comfort, convenience, or general good and welfare of the community. Mister Softee v. Mayor and Council of City of Hoboken, 186A. 2d. 573, 77 N.J. Super 354 (1962), Devine v. Mantua Township, Gloucester County, 100 A.

2d 563, 28 N.J. Super 299 (1953), BaBaris Lumber Co. v. Town of Secaucus in Hudson County, 80A. 2d. 130, 20 N.J. Super 586 (1952).

In Newark Theater Company versus City of Newark, Super, an ordinance condemning lewdness, obscenity, or indecency was upheld as not being vague and as not being unconstitutional as an improper use of police power, in violation of either the New Jersey or United States constitution and held that the ordinance prohibiting specific conduct was not obviously condemnable as violently contrary to good morals and decency. The Supreme Court recognized the right of a municipality to enact ordinances concerning obscenity as within the ambit of police authority, and as police power exercised in the public good.

The Defendants point to other activities as being permitted activities and contend that the Zoning Ordinance is discriminatory. They point to ordinances covering other coin operated amusement devices as being allowed such as massage parlors, bingo, raffles, and so forth. There apparently were specific ordinances dealing with these types of activities and these activities fall within the class of permitted uses. The permitted uses specifically refer to retail stores but then continues "such as but not limited to" and various types of retail activities are delineated. It is felt that these activities such as astrology machines referred to by the defendants are sufficiently permitted under the broad classification of permitted use, the same as an adult book store or coin operated peep shows, raffles, and bingo would appear to be a permitted use under the mandate of statutes of the State of New Jersey as incidental to activities by non-profit organizations.

Under the stipulation of facts the following was set forth.

6. The Judge will view the defendant's activities in question on the stipulation that what he sees is substantially similar to what he would have seen on the dates alleged in the pending Complaints.

It does not appear that the Municipal Court Judge viewed the defendant's activities and if the activities were continuing it would appear that there would be continuing violations. At any rate, this Court is not called upon to make a determination as to whether the activities of the nude dancers is an art and thereby protected constitutionally, or whether the activities would be lewd, obscene or immoral. In other words, this Court is not called upon to make a determination as to a distinction between bumps and grinds in the nude as compared to Swan Lake in the altogether. The concern in the present matter involves solely a zoning ordinance.

In view of the foregoing, it is determined that there has been no distinction without reason by the Municipality and that the permitted uses under the Zoning Ordinance is a reasonable exercise of police power and that the Zoning Ordinance is not directed to any infringement on the constitutionally protected rights. Live entertainment is simply not a permitted use in any establishment regardless to whether there is a relationship to nude entertainment. As stated in the case of Young versus American Mini Theaters, Inc., 427 U.S. 50, 96 S.Ct. 2440, 49 L. Ed. 2d 310 (1976) the United States Supreme Court upheld zoning of adult theaters and stated as follows: "the mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances."

The Defendant also contends that since a Certificate of Occupancy was issued, they have a right to conduct live nude entertainment. But the issuance of a Certificate of Occupancy is only a certification that the premises may be used in accordance with the Zoning Ordinance. But does not give a license or privilege for uses which are not permitted by the Zoning Ordinance. And therefore, the Certificate of Occupancy would not permit live nude dancing, but would only permit uses in consonance with the Zoning Ordinance.

Opinion of Camden County Court

On Complaints number 393, 394, and 395 charging respectively the Defendants, Six Thirteen Corporation, James F. Schad, and Juliete Ann Di Luciano with using the premises at Six Thirteen Black Horse Pike, Mount Ephraim, New Jersey for live nude dancing is in violation of the Mount Ephraim Zoning Ordinance 99-15 B, the Defendants are hereby found guilty and the fine of $100 against each defendant is hereby imposed, for a total fine of $300.00, plus Municipal and County court costs.

C E R T I F I C A T E

I, JEAN M. PETRUZZI, Certified Shorthand Reporter and Notary Public of the State of New Jersey, do hereby certify that the foregoing is a true and accurate transcript to the best of my ability, of the above-captioned matter.

Dated: September 29, 1978

s/ Jean M. Petruzzi
CERTIFIED SHORTHAND
REPORTER

OPINION OF SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-905-78

BOROUGH OF MOUNT EPHRAIM,

Plaintiff-Respondent,

v.

JAMES F. SCHAD, 613 CORPORATION and JULIETTE ANN DI LUCIANO,

Defendants-Appellants.

Argued October 9, 1979 — Decided October 17, 1979

Before Judges Bischoff and Botter.

On appeal from Camden County Court.

Lewis H. Robertson argued the cause for appellants (Levy and Robertson, attorneys).

Arnold N. Fishman argued the cause for respondent.

BY THE COURT.

The judgment entered in the Camden County Court dated October 30, 1978 is affirmed, essentially for the reasons expressed by Judge Neil F. Deighan, Jr. in his opinion of September 21, 1978.

A TRUE COPY
s/ Elizabeth McLaughlin
Clerk

ORDER OF CAMDEN COUNTY COURT ENTERING JUDGMENT OF CONVICTION

CAMDEN COUNTY COURT
CRIMINAL ACTION
APPEAL NO. 123-77

ARNOLD N. FISHMAN, P.C.
501 Cooper Street
Camden, NJ 08102
(609) 963-1888
Attorney for Plaintiff

BOROUGH OF MOUNT EPHRAIM,

Plaintiff,

vs.

JAMES F. SCHAD, DENNIS C. FAVEN, 613 CORP. and JULIETTE ANN DiLUCIANO,

Defendants.

THIS MATTER being opened to the Court by Levy & Robertson, Esquires, Lewis H. Robertson, Esquire, appearing, attorneys for defendants, and in the presence of Arnold N. Fishman, Esquire, Prosecutor for the Municipal Court of the Borough of Mount Ephraim, and the Court having considered the stipulations, memoranda, as well as the arguments of counsel, and good cause having been shown;

IT IS on this 30th day of October, 1978, ORDERED that the conviction of the defendant, Dennis C. Faven, for a violation of Ordinance number 99-2.j of the Ordinances of the Borough of Mount Ephraim be and the same is hereby reversed; and

IT IS further ORDERED that the convictions of the defendants, 613 Corp., James F. Schad, and Juliette Ann

Order of Camden County Court

DiLuciano, for violation of section 99-15B of the Zoning Ordinance of the Borough of Mount Ephraim be and the same is hereby affirmed, and each of the defendants are fined the amount of One Hundred ($100.00) Dollars, for a total of Three ($300.00) Hundred Dollars in fines, plus costs in both the Municipal and County Courts.

s/ Neil F. Deighan, Jr.
NEIL F. DEIGHAN, JR., J.C.C.

ORDER OF NEW JERSEY SUPREME COURT DENYING PETITION FOR CERTIFICATION

SUPREME COURT OF NEW JERSEY
C-373 SEPTEMBER TERM 1979

BOROUGH OF MOUNT EPHRAIM,

Plaintiff-Respondent,

v.

JAMES F. SCHAD, et al.,

Defendants-Petitioners.

To the Appellate Division, Superior Court;

A petition for certification of the judgment in A-905-78 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 14th day of January, 1980.

s/ Stephen W. Townsend
Clerk

A TRUE COPY
s/ Stephen W. Townsend
Clerk

ORDER OF NEW JERSEY SUPREME COURT DISMISSING APPEAL

SUPREME COURT OF NEW JERSEY
16,581 SEPTEMBER TERM 1979

BOROUGH OF MOUNT EMPHRAIM,

Plaintiff-Respondent,

v.

JAMES F. SCHAD, et al.,

Defendant-Appellants.

This matter having been duly presented to the Court, it is ORDERED that the appeal in the within matter is dismissed pursuant to *R.*2:12-9.

WITNESS, the Honorable Robert N. Wilenz, Chief Justice, at Trenton, this 14th day of January, 1980.

s/ Stephen W. Townsend
Clerk

A TRUE COPY
s/ Stephen W. Townsend
Clerk

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
CAMDEN COUNTY

APPEAL NO. 123-77

Criminal Action

Levy, Robertson and Herson, Esqs.
1319 Memorial Drive
Post Office Box 901
Asbury Park, New Jersey 07712
(201) 988-5683

BOROUGH OF MOUNT EPHRAIM,

Plaintiff,

vs.

JAMES F. SCHAD, DENNIS C. FAVEN, 613 CORPORATION and JULIETTE ANN DI LUCIANO,

Defendants.

I. Notice is hereby given that defendants James F. Schad, 613 Corporation and Juliette Ann Di Luciano, the Defendants-Appellants above named, hereby appeal to the Supreme Court of the United States from the Final Judgment of the Supreme Court of New Jersey entered in this action on January 18, 1980 denying their Petition for Certification and dismissing their appeal from the decision of the Superior Court of New Jersey, Appellate Division, decided on October 17, 1979 in which their conviction by the Camden Court entered on November 3, 1978 was affirmed.

Notice of Appeal

This appeal is taken pursuant to Title 28, United States Code Section 1257, subparagraph (2).

II. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States and include in said transcript all Complaints, Orders, Notices, Petitions, and other pleadings, briefs, memoranda, decisions and transcripted proceedings.

III. The following questions are presented by this appeal:

Whether a municipality may, without violation of the defendants' constitutional guarantees of free speech and due process, impose criminal penalties for the violation of its zoning ordinance which ordinance purports to proscribe all forms of live entertainment within the municipality's boundaries.

LEVY, ROBERTSON
& HERSON, ESQS.
Attorneys for James F. Schad, 613 Corporation and Juliette Ann Di Luciano-Defendants-Appellants

s/ Robert E. Levy
BY: ROBERT E. LEVY

PROOF OF SERVICE

I, Robert E. Levy, one of the attorneys for James F. Schad, 613 Corporation and Juliette Ann Di Luciano, appellant herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 10th day of April, 1980, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the Borough of Mount Ephraim by causing a copy of the same to be placed in a regular depository for the United States Mail in a secure wrapper with

Notice of Appeal

First Class postage prepaid addressed to Arnold N. Fishman, Esq., Counsel of Record for the Borough of Mount Ephraim addressed to 501 Cooper Street, Camden, New Jersey 08102.

s/ Robert E. Levy
ROBERT E. LEVY

No. 79-1640

In The

Supreme Court of the United States

October Term, 1980

JAMES F. SCHAD, 613 CORPORATION and JULIETTE ANN DI LUCIANO,

Appellants,

vs.

BOROUGH OF MOUNT EPHRAIM,

Appellee.

On Appeal from the Supreme Court of New Jersey

JOINT APPENDIX

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APPEAL DOCKETED APRIL 16, 1980
PROBABLE JURISDICTION NOTED OCTOBER 14, 1980

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DOCKET ENTRIES

A. Camden County Court, Appeal Number 123-77

6-13-78	Notice of Appeal filed.
8-24-78	Transcript filed.
	4 Complaints filed.
	Ordinance: 99-26.J — Did paint a sign on the outside of the building located at 613 Black Horse Pike, Mt. Ephraim, N.J.
	Zoning Section 99-15 B — Using its premises for live nude dancing at 613 Black Horse Pike.
	Zoning Section 99-15 B — Using its premises for live nude dancing at 613 Black Horse Pike.
	Zoning Section 99-15 B — Using its premises for live nude dancing at 613 Black Horse Pike.
8-28-78	On Transcript — Oral Argument.
	Briefs and Stipulations to be submitted.
	Disposition: Court to take matter under advisement.
	NOTE: James F. Schad does not apply to this appeal. His case was dismissed below.
10-31-78	Disposition: Order received and filed 10-30-78 — Judge Deighan:

Docket Entries

Dennis C. Faven — Ord. 99-26.J — Convictions reversed.

613 Corp., James F. Schad and Juliette Ann Di Luciano — Zoning Section 99-15 B — Conviction affirmed. Fine of $100.00 each for a total of $300.00 (paid to Office of County Clerk on 10-27-78). Plus $6.00 County Court Costs (not paid as of 10-30-78) (No Municipal Court Costs — none were imposed below.)

11-3-78 ORDER

THIS MATTER being opened to the Court by Levy & Robertson, Esquires, Lewis H. Robertson, Esquire, appearing, attorneys for defendants, and in the presence of Arnold N. Fishman, Esquire, Prosecutor for the Municipal Court of the Borough of Mount Ephraim, and the Court having considered the stipulations, memoranda, as well as the arguments of counsel, and good cause having been shown;

IT IS on this 30th day of October, 1978, ORDERED that the conviction of the defendant Dennis C. Faven, for a violation of Ordinance number 99.2.j of the Ordinances of the Borough of Mount Ephraim be and the same is hereby reversed; and

IT IS further ORDERED that the convictions of the defendants, 613 Corp., James F. Schad, and Juliette Ann Di Luciano, for a violation of Section 99-15B of the Zoning Ordinance of the

Borough of Mount Ephraim be and the same is hereby affirmed, and each of the defendants are fined the amount of One Hundred ($100.00) Dollars, for a total of Three ($300.00) Hundred Dollars in fines, plus costs in both the Municipal and County Courts.

s/ NEIL DEIGHAN, JR., J.C.C.

11-27-78	Copy of Notice of Appeal to Appellate Division filed.
4-14-80	Notice of Appeal to the Supreme Court of the United States filed.

B. Superior Court of New Jersey, Appellate Division

11-24-78	Notice of Appeal filed.
3-1-79	Appellant brief received.
3-6-79	Transcript received.
4-16-79	Respondent brief received.
4-19-79	Reply brief on behalf of appellant received.
6-8-79	Letter communication. Re: Additional citations (appellant) received.
7-24-79	Date submitted to Court.
10-9-79	Date argued.

Docket Entries

10-17-79	Date decided.
11-5-79	Notice of Petition for Certification to Appellate Division.
11-5-79	Notice of Appeal to Supreme Court of New Jersey.

C. Supreme Court of New Jersey

11-5-79	Notice of Petition for Certification.
11-8-79	Notice of Appeal to Supreme Court of New Jersey.
11-15-79	Petition for Certification.
11-15-79	Appellate Division briefs received.
12-3-79	Appellate Division brief received.
12-3-79	Motion to Dismiss Appeal filed.
12-14-79	Letter Memorandum in Opposition to Motion to Dismiss Appeal received.
12-15-79	Respondent's brief filed.
1-18-80	Order dismissing appeal filed.
1-18-80	Order dismissing Motion to Dismiss Appeal as Moot filed.
1-18-80	Order denying Certification filed.
4-11-80	Notice of Appeal to United States Supreme Court filed.

NOTE

According to Rules of the Supreme Court, Rule 30.1, the jointly designated pleadings, findings, conclusions, and opinions, the judgment, order or decision in question, and all other parts of the record to which the parties wish to direct the Court's attention have not been reproduced here as they appear in the Appendix to the Jurisdictional Statement of the appellants. The Court is respectfully directed to that Appendix.

Supreme Court, U. S.
FILED
JUN 16 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1979

No. 79-1640

BOROUGH OF MOUNT EPHRAIM,

Respondent,

vs.

JAMES F. SCHAD, 613 CORPORATION and JULIETTE ANN DI LUCIANO,

Appellants/ Petitioners.

RESPONDENT'S MOTION TO DISMISS AND AFFIRM THE LOWER COURT DECISION

and

RESPONDENT'S BRIEF IN OPPOSITION TO APPELLANT'S PETITION FOR CERTIFICATION

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3364
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Argument:

I. The petitioners' appeal should be dismissed, or in the alternative, the decision of the state court should be affirmed pursuant to Supreme Court Rule 16 by reason that the appeal is not within the jurisdiction of this Court, because it was not taken in conformity to statute. 7

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IV. The petitioners' petition for certiorari should be denied pursuant to Supreme Court Rule 19 because there are neither special nor important reasons for the granting of such a writ. 12

Conclusion 13

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APPENDIX

Borough of Mount Ephraim v. 613 Corporation et al. 1a

In The

Supreme Court of the United States

October Term, 1979

No. 79-1640

BOROUGH OF MOUNT EPHRAIM,

Respondent,

vs.

JAMES F. SCHAD, 613 CORPORATION and JULIETTE ANN DI LUCIANO,

Appellants/ Petitioners.

RESPONDENT'S MOTION TO DISMISS AND AFFIRM THE LOWER COURT DECISION

and

RESPONDENT'S BRIEF IN OPPOSITION TO APPELLANT'S PETITION FOR CERTIFICATION

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 16 of the Rules of the Supreme Court of the United States, the Borough of Mount Ephraim, respondent, moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of the State of New Jersey and the Superior Court of the State of New Jersey, Appellate Division, on the grounds hereinafter set forth.

Pursuant to Rule 24 of the Rules of the Supreme Court of the United States, the Borough of Mount Ephraim, respondent herein, files this brief in opposition to the appellant's petition for a writ of certiorari to the Supreme Court of New Jersey.

OPINIONS BELOW

The petitioners were charged in the Borough of Mount Ephraim with the use of the premises of 613 Corporation in the form of live nude dancing as being in violation of the Borough Zoning Ordinance, Section 99-15B (this ordinance is set forth in full in the petitioners' brief). At the time that this matter was presented to the Municipal Court, there was a stipulation of seven issues and six factual statements between counsel for the appellants and respondent. This stipulation of issues is set forth in the respondent's appendix, which contains certified portions of the record below which are additional to those filed by the petitioner. Remaining from the original seven issues are numbers two and three.

An opinion was rendered by the Mount Ephraim Municipal Court, which was then reviewed and heard *de novo* on the record by the Camden County Court. In that court, certain convictions were reversed and others affirmed. The respondent disagrees with the statements of the petitioners as to the findings of the courts below in that certain issues presently raised by the petitioners were not raised below notwithstanding the fact that the petitioners have consistently raised these arguments in their briefs to each of the four courts which have previously reviewed this case.

The opinion of the Camden County Court was affirmed by the Superior Court of New Jersey, Appellate Division, for the reasons expressed below.

The Supreme Court of New Jersey declined to issue a writ of certiorari to the Superior Court of New Jersey, Appellate

Division and by virtue of Rule 2:12-9 of the Rules of the Courts of the State of New Jersey, the denial of that writ automatically served as a dismissal of the appeal.

JURISDICTION

I. The review before this Court is not that of the proper lower court.

Respondent disagrees with the statement of jurisdiction found in the appellant's petition by reason of the petitioner's failure to comply with 28 U.S.C. §2057(2) or in the alternative, §2057(3). The law is clear that the Supreme Court of the United States can only review a final judgment or a decree rendered "by the highest Court of a State in which a decision could be had." This does not mean that only the highest court in a State can be reviewed. This has been interpreted many times to mean that in the event that the highest court of the State declines to exercise its authority, the judgment of the intermediate court, rather than the order of the refusal of the higher court is the judgment reviewable under 28 U.S.C. §2057. Decisions thought to sustain this proposition are *Michigan-Wisconsin Pipeline Company v. Calvert*, 347 U.S. 157, 160 (1953) and *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 678 n.1 (1967). In the case *sub judice*, the last decision was that of the Superior Court of New Jersey, Appellate Division. The Supreme Court of New Jersey declined to issue a writ of certiorari to the Superior Court of New Jersey, Appellate Division and by virtue of that ruling, New Jersey Court Rule 2:12-9 effects an automatic dismissal of the appeal. Therefore, the proper review would be that of the Superior Court of New Jersey, Appellate Division and not that of the Supreme Court of the State of New Jersey. Accordingly, it is respectfully submitted by the respondent, that this Honorable Court does not have jurisdiction in the within matter.

II. Issues raised before this Court were not properly raised below.

The respondent also submits that one issue raised by the petitioners before this Court, namely whether the relevant zoning ordinance of the respondent effects a denial of the petitioner's rights of due process was not properly raised below. The law is clear that once a case reaches this High Court, that review is limited to the specific federal questions that were properly raised in the state courts. *Whitney v. California,* 274 U.S. 357, 362-3 (1927); *Dewey v. Des Moines,* 173 U.S. 193, 197-8 (1899); *State Farm Mutual Insurance Company v. Duel,* 324 U.S. 154, 160-1 (1945).

While the petitioner sets forth on page six as part of its procedural history the raising of the due process argument in its brief to the Municipal Court, this issue was not one of the seven issues stipulated by and between the parties; and further, briefs before the state courts are not ordinarily part of the record filed with the United States Supreme Court and cannot be used to establish that a federal question was raised. *Live Oak Association v. Railroad Commission,* 269 U.S. 354, 357-8 (1926); *Lynch v. New York ex rel. Pierson,* 293 U.S. 52, 54 (1934). Because this issue was not raised below, no evidence upon this issue was produced. The due process argument relates to a nexus being established between the ordinance and the objectives furthered by that ordinance. There is nothing in the record on this issue as it was stipulated not to be an issue by virtue of its omission from the seven issues as agreed.

ORDINANCES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Borough of Mount Ephraim Zoning Ordinance, Section 99-15B as set forth in the petitioners' brief and the First Amendment to the Constitution of the United States are the ordinances and constitutional provisions involved in the within matter.

Rule 2:12-9 of the Courts of New Jersey provides:

> "Where a party seeks certification to review a final judgment of the Appellate Division and also appeals therefrom, he shall state in the petition for certification all questions he intends to raise on the appeal. The denial of certification shall be deemed to be a summary dismissal of the appeal, and the Clerk of the Supreme Court shall forthwith enter an order dismissing the appeal, unless the Supreme Court otherwise orders."

QUESTIONS PRESENTED

Is petitioner's live nude dancing protected by the First Amendment of the United States Constitution and has the Borough of Mount Ephraim engaged in selective enforcement of its zoning ordinance?

The respondent disagrees with the questions presented by the petitioners in that the petitioners sets forth issues far broader that those raised earlier in these proceedings. The stipulated questions were whether the municipality, in the present factual context, may prohibit the petitioners' live nude dancing, and whether such enforcement of the zoning ordinance has resulted in selective enforcement as applied to the petitioners.

STATEMENT OF THE CASE

A. Statement of the Facts

The respondent adopts the statement of the facts as set forth in the petitioners' brief.

B. Procedural History

This action began with complaints by the Borough of Mount Ephraim charging James F. Schad, 613 Corporation and Juliette Ann Di Luciano with the use of the premises of 613

Corporation for a use contrary to the provisions of the Borough of Mount Ephraim Zoning Ordinance Section 99-15B. At that time, counsel for the respective parties entered into a stipulation of seven legal issues and six factual statements which are set forth both in the opinion of the Camden County Court at page 6a of the appendix of the petitioners' brief, as well as in the additional certified portion of the record attached to this brief. The Municipal Court of the Borough of Mount Ephraim found the defendants guilty of the various charges, including violation of the Borough's zoning ordinance.

With respect to the six stipulated facts, the parties failed to agree on number 4 and testimony was taken in the Municipal Court from the Chief of Police and Building Inspector of the Borough of Mount Ephraim on the issue of the Borough's alleged selective enforcement of the zoning ordinance, along with testimony on the issue of whether other forms of live entertainment in the Borough were either nonconforming or accessory uses. No other testimony was produced by either party. It is important to note this because the next level of review from a Municipal Court is a trial *de novo* upon the record in the County Court. The record that is made in a Municipal Court cannot be supplemented nor even remanded for further findings by the reviewing court. Facts not presented in the Municipal Court have no way of finding their way into the record of the County Court. Accordingly, the seven issues mentioned above were the only issues before the Municipal Court and are necessarily the only issues that can properly come before any reviewing court. [The nature of *de novo* review is fully detailed in *State v. Johnson*, 42 N.J. 146 (1964).]

The petitioners filed a notice of appeal which was heard by the Camden County Court. That court held that there was no selective enforcement of the Borough's zoning ordinance, nor did it offend the First Amendment.

The Superior Court of New Jersey, Appellate Division, reviewed the opinion and record before the Camden County

Court and affirmed the opinion of the Camden County Court essentially for the reasons contained in that opinion.

The New Jersey Supreme Court declined to grant the petitioners-appellants' petition for certification which by virtue of New Jersey Court Rule 2:12-9, also effected an automatic dismissal of the appeal.

Accordingly, remaining from the original seven issues are issues number 2 and 3 on the stipulation constituting respondent's appendix. Issues number 4, 5, 6 and 7 all relate to a sign ordinance not related to this appeal.

ARGUMENT

I.

The petitioners' appeal should be dismissed, or in the alternative, the decision of the state court should be affirmed pursuant to Supreme Court Rule 16 by reason that the appeal is not within the jurisdiction of this Court, because it was not taken in conformity to statute.

As set fourth in the jurisdictional statement of this brief, the respondent believes that this Court does not have jurisdiction.

II.

Petitioners' appeal should be dismissed pursuant to Supreme Court Rule 16(1)b on the ground that it does not present a substantial federal question.

The respondent's position is that the alleged federal issue on the First Amendment is not substantial because the prohibition of live nude entertainment is a valid exercise of the police power of the municipality; the ordinance is not aimed at suppressing speech, but is designed to regulate land use within the Borough's

boundaries. Parenthetically, there is no contention on the part of the respondent that if live nude dancing were permitted, it would be obscene.

The issue before this Court is whether the petitioner has an absolute and unqualified right to present live nude dancing in the Borough of Mount Ephraim; the First Amendment only comes into play as an incidental issue as to whether the zoning ordinance is constitutionally defective because it runs afoul of the First Amendment of the United States Constitution. This Court's prior holdings indicate that live nude dancing is not entitled to the prophylatic protection afforded pure speech. In *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976), this High Court was faced with the issue of the validity of the zoning ordinance of the City of Detroit, which required adult theaters to be disbursed throughout the city. In *Young*, the city zoning ordinance differentiated between "adult" theaters and those theaters which were not. The Court, noting that there was no denial of access to the market by reason of the zoning ordinance held, at page 320:

> "we are not persuaded that the Detroit Zoning Ordinance will have a significant deterrent effect on the exhibition of films protected by the First Amendment."

The Court went on to say, at page 321, that:

> "The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances."

The thrust of *Young* is that a community clearly has the right to regulate its own affairs and what takes place within its boundaries. This includes the presentations of movies, all movies, including obscene movies. Petitioner has filed to prove

that the Zoning Ordinance of the Borough of Mount Ephraim will deny the petitioner's access to the market, or that the intended use is uniquely appropriate to this location.

In *California v. La Rue*, 409 U.S. 109 (1972), the Court was faced with the issue of whether the California Department of Alcoholic Beverage Control had the authority to suspend or revoke any license if it determined that it was contrary to public welfare and morals.

The Court found that the California ABC had such authority and that the regulation was rationally related to the public good. The rationale of *La Rue* was that the ordinance was licensing not a controlling of obscenity, which are the same facts and issues as the case at bar. It further held that the State was not limited to approaching nude dancing on First Amendment grounds alone.

Chief Judge Cohen of the District Court of New Jersey, in his opinion of *Starshock, Inc. v. Shusted*, 370 F. Supp. 506 (D. N.J. 1974), *reversed on other grounds*, 493 F. 2d 1401 (3rd Cir. 1976), was faced with the issue of "is nude interpretive dancing embraced within the guarantee of freedom of speech under the First Amendment to the United States Constitution." page 507.

The court held at page 508:

> "plaintiffs fail in their argument to note the significant distinction between speech and conduct. The public exposure of sex organs and nudity in this setting is not a matter of free expression. Rather these acts are conduct cognizable as a crime under the common law (citations omitted) and generally considered as having a reasonable relationship to the public welfare, and therefore, within the police power of the legislature."

The court further noted at page 509 that:

> "The United States Supreme Court has consistently recognized the distinction between conduct, which may be regulated by the State, and expression, which may not be interfered with except upon proof of obscenity, *Miller v. California,* 413 U.S. 15 (1973)."

Starshock clearly stands for the proposition that nude dancing is not within the First Amendment. Put simply, petitioners' nude dancing is not speech; and hence is not entitled to the protections afforded speech.

Respondent's contentions are further bolstered by looking at the matter that is presently being sold, that is, books, magazines, movies and sexual paraphernalia by the petitioners. What is being regulated is not free speech but activities and conduct that is to take place in the municipality. Live entertainment is available throughout Camden County as is nude dancing in certain locations. Because the Borough of Mount Ephraim has elected not to allow live entertainment within its boundaries cannot give petitioners a bootstrap argument that this violates its First Amendment rights. Parenthetically, it should be noted in the context of prior restraint that the petitioners offered live entertainment, and this action only arose after such entertainment was offered. Accordingly, there can be no question that the Borough of Mount Ephraim did not prevent the initial acts of the petitioners.

As in *Young, supra,* there is no suppression of free speech reflected by the enforcement of the Borough's ordinance.

Much of the petitioners' grounds for establishing the substantiality of the federal question is based upon a due process argument. The due process argument was never properly raised

below and the respondent never had an opportunity to introduce evidence on that issue. Accordingly, it is not before this Court and this Court respectfully does not have jurisdiction to entertain this issue.

III.

The petitioners' appeal should be dismissed pursuant to Supreme Court Rule 16(1)b by reason that the federal question sought to be reviewed as to denial of due process, was not properly raised below.

This is discussed in the jurisdiction section of this brief, found on page 4.

Additionally, this Court has long held that in order for the Supreme Court of the United States to sustain jurisdiction on direct appeal, a substantial federal question must have been involved in the prior state court proceedings. As early as 1878, Chief Justice Waite stated: "It is not enough that a Federal question may have been raised. We have no jurisdiction unless it was actually raised and either decided or necessarily involved the judgment pronounced." *Hager v. California,* 24 L. Ed. 1044, 154 U.S. 639 (1878). Later decisions of this Court have reaffirmed this position. *Anonymous v. Baker,* 360 U.S. 287, 3 L. Ed. 2d 1234, 79 S. Ct. 1157 (1959). In *Arlans Department Store of Louisville Inc. v. Kentucky,* 371 U.S. 218, 9 L. Ed. 2d 264, 83 S. Ct. 277 (1962), this Court, in a *per curiam opinion,* held that the Sunday Closing Law for retail stores did not pose a substantial federal question even though appellants argued a denial of First Amendment freedoms in that case.

IV.

The petitioners' petition for certiorari should be denied pursuant to Supreme Court Rule 19 because there are neither special nor important reasons for the granting of such a writ.

Rule 19 of the Rules of the Supreme Court provide that "a review of Writ of Certiorari is not a matter of right, but of sound judicial discretion and will be granted only where there are special and important reasons therefore." The respondent submits that such reasons do not exist.

This Court has consistently denied petitions for writs of certiorari where constitutional attacks on ordinances or statutes were raised for the first time on appeal. *Monks v. New Jersey,* 90 S. Ct. 1563, 398 U.S. 71, 26 L. Ed. 2d 572 (1970), *Cardinal v. Louisiana,* 89 S. Ct. 1162, 394 U.S. 437, 22 L. Ed. 2d 398 (1969). In *Monks,* the petitioner argued, for the first time before this Court, that a New Jersey statute was unconstitutional as applied to him. The Court held that the lower courts had no opportunity to review this contention and dismissed the writ of certiorari as having been previously improvidently granted.

The only reasons advanced by the petitioners for granting certification are the mouthing of violations of constitutional safeguards. The mere incantation of violation of constitutional safeguards cannot give rise to the issuance of a writ of certiorari. As set forth in Point II of this memorandum, the court's decision below is entirely consistent with the dictates of the Supreme Court.

CONCLUSION

For the reasons set forth herein, respondent respectfully prays this Honorable Court to dismiss appellants' appeal and deny petition for writ of certiorari.

Respectfully submitted,

s/ Arnold N. Fishman
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Attorney for Respondent

APPENDIX

BOROUGH OF MOUNT EPHRAIM v. 613 CORPORATION ET AL.

Issues

1. Is live entertainment permitted under the Zoning Ordinances of the Borough of Mount Ephraim in a C Zone?

2. Is defendants' live nude dancing protected by the First Amendment?

3. Has the Borough of Mount Ephraim engaged in selective enforcement of its Zoning Ordinances?

4. May defendant place a new legend upon its obliterated non-conforming sign advertising live nude dancing?

5. Must defendant secure a permit to repaint the sign with a new legend?

6. May defendant replace the old legend from its obliterated non-conforming sign?

7. Must defendant secure a permit to return the old legend?

Facts

1. Defendant opened for business at its present location in a C Zone in the Borough of Mount Ephraim in June, 1973.

2. From its inception, defendant exposed for sale adult books, magazines and paraphenalia as well as having coin-operated movie peep shows.

3. In July, 1976, defendant commenced offering live nude dancing.

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4. Both the Chief of Police and Building Inspector of the Borough of Mount Ephraim will testify that all other entertainment in the C Zone of the Borough of Mount Ephraim is by way of non-conforming use.

5. Also, in July, 1976 defendant obliterated the legend from its existing non-conforming sign without obtaining a permit.

6. The Judge will view the defendant's activities in question on the stipulation that what he sees is substantially similar to what he would have seen on the dates alleged in the pending Complaints.

No. 79-1640

Supreme Court U.S.
FILED
DEC 4 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1980

JAMES F. SCHAD, 613 CORPORATION and JULIETTE ANN DI LUCIANO,

Appellants,

vs.

BOROUGH OF MOUNT EPHRAIM,

Appellee.

On Appeal from the Supreme Court of New Jersey

BRIEF FOR APPELLANTS

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APPEAL DOCKETED APRIL 16, 1980
PROBABLE JURISDICTION NOTED OCTOBER 14, 1980

QUESTIONS PRESENTED

1. May a municipality, in the exercise of its zoning power, proscribe all forms of live entertainment within its boundaries without violation of the appellants' federal constitutional guarantees of freedom of speech and expression and due process?

2. The appellants maintain a form of amusement device consisting of a booth in which a brief film is exhibited upon the insertion of a coin by a patron. The device is acknowledged by the appellee to be a use permitted by its zoning ordinances. Those same ordinances have been interpreted to proscribe a second amusement device also consisting of a booth, also coin-activated, but which permits the patron to view a live dancer performing beyond a glass panel instead of a film.

Are not those zoning ordinances, as interpreted and applied, transgressive of the appellants' federal constitutional guarantees of due process and equal protection in that those ordinances proscribe the second amusement device despite the absence of any factors which differentiate it, for the purposes of zoning, from the first amusement device?

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No. 79-1640

In The

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JAMES F. SCHAD, 613 CORPORATION and JULIETTE ANN DI LUCIANO,

Appellants,

vs.

BOROUGH OF MOUNT EPHRAIM,

Appellee.

On Appeal from the Supreme Court of New Jersey

BRIEF FOR APPELLANTS

OPINIONS BELOW

Neither the opinion of the Camden County Court nor the opinion of the Superior Court of New Jersey, Appellate Division affirming the judgment of the lower court were reported. Those opinions, as well as the judgment of the Camden County Court are reprinted in the Appendix to the Jurisdictional Statement and appear at pages 1a, 14a and 15a respectively. The order of

the New Jersey Supreme Court denying the appellants' petition for certification appears at 82 N.J. 287 (1980). (According to the Rules Governing the Courts of the State of New Jersey, where a party seeks certification to review a final judgment of the Appellate Division and also appeals therefrom, the denial of certification constitutes a summary dismissal of the appeal. Rule 2:12-9.)

JURISDICTION

In this matter, the appellants have been made to suffer criminal penalties for their purported violation of the appellee's zoning ordinances — ordinances which they contend are transgressive of their federal constitutional guarantees of freedom of speech and expression, due process and equal protection embodied in the First and Fourteenth Amendments.

On January 18, 1980, the Supreme Court of New Jersey entered separate orders dismissing the appellants' appeal from and denying their petition for certification to the Superior Court of New Jersey, Appellate Division. The appellants filed their notice of appeal on April 14, 1980 and their appeal was docketed by the Clerk of the United States Supreme Court on April 16, 1980. Accordingly, the Supreme Court of the United States has jurisdiction to review the final judgment by direct appeal pursuant to 28 U.S.C. §1257(2).

ORDINANCES AND CONSTITUTIONAL PROVISIONS INVOLVED

Borough of Mount Ephraim Zoning Ordinance 99-15B provides:

> "B. Principal permitted uses on the land and in buildings.

(1) Offices and banks; taverns; restaurants and luncheonettes for sit-down dinners only and with no drive-in facilities; automobile sales; retail stores, such as but not limited to food, wearing apparel, millinery, fabrics, hardware, lumber, jewelry, paint, wallpaper, appliances, flowers, gifts, books, stationery, pharmacy, liquors, cleaners, novelties, hobbies and toys; repair shops for shoes, jewels, clothes and appliances; barbershops and beauty salons; cleaners and laundries, pet stores; and nurseries. Offices may, in addition, be permitted to a group of four (4) stores or more without additional parking, provided the offices do not exceed the equivalent of twenty percent (20%) of the gross floor area of the stores.

(2) Motels."

Borough of Mount Ephraim Zoning Ordinance 99-4 provides:

"§99-4. Prohibited uses.

All uses not expressly permitted in this chapter are prohibited."

First Amendment to the Constitution of the United States provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress or grievances."

Fourteenth Amendment to the Constitution of the United States provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. Statement of the Facts

The essential facts are simply stated. In June of 1973, the appellants opened for business in a commercial zone in the Borough of Mount Ephraim, offering for sale, at retail, various books, magazines and films. Shortly after its commencement of business, 613 Corporation obtained amusement licenses for the operation of a number of coin-operated devices. Each of the devices consisted of a booth in which a film is shown upon the patron's insertion of a coin. In July of 1976, the appellants commenced to offer an additional form of amusement. That second form of amusement consisted of a booth with an opaque glass panel. Upon the patron's insertion of a coin, the panel became clear which enabled the patron to view a dancer — usually nude — performing beyond the glass. It is the Borough's contention that the appellants' conduct, in offering that second form of amusement, violated its zoning laws and made them subject to criminal penalties.

B. Procedural History

This action began with complaints by the Borough of Mount Ephraim charging James F. Schad, 613 Corporation and Juliette Ann DiLuciano with the use of the premises of 613 Corporation for a use contrary to the provisions of the Borough of Mount Ephraim Zoning Ordinance 99-15B. In that proceeding, the appellants filed a brief in support of their motion to dismiss the complaints. In their brief, the appellants argued that the Borough's interpretation of its ordinance and the application of the ordinance to them violated the appellants' rights secured by the First and Fourteenth Amendments to the United States Constitution. Specifically, the appellants contended that the activity to which the Borough objected — live nude dancing — was expression presumptively protected by the First Amendment. Further, the appellants contended that the Borough's ordinance (which the Borough interpreted to proscribe live entertainment throughout its boundaries) attempted to suppress rather than regulate presumptively protected expression and that the ordinance was unduly vague and overly broad. The brief further contended that the ordinance offended the requirements of due process and equal protection in that, in its application to the appellants, it was unreasonable and arbitrary. The municipal court specifically determined that the appellants' activity was not protected by the First Amendment and impliedly determined the balance of the issues raised by the appellants against them in its decision on June 2, 1978. Each of the appellants were found guilty and sentenced to pay a fine of $300 (JS2a).

The appellants filed a timely notice of appeal with the Camden County Court on June 13, 1978. A trial *de novo* was had on the record made in the municipal court to include the briefs filed with that court (JS1a). The Camden County Court determined that, although live nude dancing is protected by the First Amendment ". . . First Amendment guarantees are not

involved in this matter." (JS8a). It further determined that ". . . there has been no distinction without reason by the Municipality and that the permitted uses under the Zoning Ordinance is a reasonable exercise of police power and that the Zoning Ordinance is not directed to any infringement on the constitutionally protected rights." (JS12a). Impliedly rejecting the balance of the appellants' contentions, the Camden County Court found each of them guilty as charged and sentenced each of them to pay a fine together with costs (JS13a). An order to that effect was entered on November 3, 1978 (JS15a).

On November 24, 1978, the appellants filed their notice of appeal from their conviction in the Camden County Court with the Superior Court of New Jersey, Appellate Division. On appeal, the appellants contended that their convictions were violative of their First and Fourteenth Amendment guarantees. The Appellate Division affirmed the appellants' convictions on October 17, 1979 for the reasons expressed by the Camden County Court (JS14a).

On November 5, 1979, the appellants filed both a notice of petition for certification and a notice of appeal to the Supreme Court of New Jersey. The appellants sought review on grounds which included their contention that their convictions were violative of the First and Fourteenth Amendment guarantees. On January 18, 1980, the New Jersey Supreme Court entered an order denying the appellants' petition for certification and dismissing their appeal (JS17a, 18a).

The appellants filed their notice of appeal to the Supreme Court of the United States on April 14, 1980 (JS19a). Their appeal was docketed on April 16, 1980 and probable jurisdiction was noted on October 14, 1980.

SUMMARY OF ARGUMENT

The appellants will readily concede that the appellee has the power to enact zoning ordinances and that those ordinances are, generally, to be afforded a presumption of validity when attacked. However, when the exercise of the municipality's authority conflicts with such "preferred freedoms" as First Amendment values, the usual presumption of validity is heavily outweighed by other considerations. Specifically, where governmental regulation incidentally impinges upon freedom of speech and expression, the court requires the regulation to be found necessary to further an important or substantial governmental interest unrelated to the suppression of free expression and requires the regulation to be such that the incidental restriction on First Amendment freedoms be no greater than is essential to the furtherance of that governmental interest. The court further must subject the regulation to particularly careful scrutiny.

The appellee's zoning ordinance has been contended by it and has been found by the Camden County Court to proscribe live entertainment — presumably in all of its forms — throughout the Borough. More particularly, the appellee's zoning ordinances have been found to proscribe the live nude dancing entertainment offered by the appellants. That live entertainment in general and live nude dancing in particular clearly are covered by the First Amendment's protective cloak. However, no interest whatsoever has been advanced by the appellee as justification for its total ban on live entertainment except perhaps, implicitly, the advancement of the public welfare through zoning. The appellee's interest, whatever it may be, has not been shown to be substantial in the pertinent sense, nor is the appellee's zoning regulation purportedly furthering that interest in any way "tailored" so as to restrict, as little as

possible, First Amendment freedoms. The ordinance therefore, fails to meet the test for regulations which incidentally burden freedom of speech and expression.

Irrespective of any other defects in the Borough's zoning ordinances, they constitute a prior restraint on protected expression in that they require any use of premises located in the Borough for live entertainment to be preceded by the grant by the Borough of a variance. The system of prior restraints imposed by the Borough is unable to overcome the heavy presumption against its invalidity, fits into none of the limited exceptions where the prior restraints are allowed and, further, is procedurally deficient.

Finally, appellee's sincerity in any assertion that that interest is unrelated to the suppression of free expression is subject to question. For the application of the appellee's zoning ordinances to the appellants' conduct has the very strong appearance of being a mask for the harassment of the appellants. Accordingly, the ordinance, as interpreted and applied, is invalid as an unconstitutional suppression of free expression.

Due process and equal protection concepts require that classifications made by a regulating body will not be unreasonable, arbitrary or capricious. The appellee's zoning ordinance, as interpreted and applied, permits the appellants to maintain coin-operated amusement booths in which patrons may individually view films. It prohibits, however, coin-operated amusement booths in which patrons may individually view a live nude dancer. There being nothing about the second form of amusement which is, in any way, any more inimical to the purposes of the Borough's zoning ordinance than the first, the ordinance, as interpreted and applied, is arbitrary, unreasonable and therefore, invalid. This is expecially so as the appellee has advanced not even a single reason for the distinction that it has made.

ARGUMENT

I.

THE ZONING ORDINANCES OF THE BOROUGH OF MOUNT EPHRAIM AS INTERPRETED AND APPLIED TO THE APPELLANTS IMPERMISSIBLY BURDEN AND SUPPRESS THE APPELLANTS' FIRST AMENDMENT FREEDOMS.

A. Introduction: The Conflict Between the Zoning Power and Fundamental Rights.

At the outset, the appellants readily acknowledge that municipalities have long been empowered to promulgate land use regulations to promote the public health, safety, morals or general welfare and that those regulations may embrace a broad range of governmental purposes.[1] Further, deference should be given to governmental judgments concerning proper land-use allocation and no interference with land-use regulations should be brooked unless those regulations are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." *Euclid v. Amber Realty Co.*, 272 U.S. at 395.

A concept coordinate with the preference usually accorded to land-use regulation is the pre-eminence of certain "preferred freedoms".

> "There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of that Constitution, such as

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1. *Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926); *Nectow v. Cambridge*, 277 U.S. 183 (1928); *Berman v. Parker*, 348 U.S. 26 (1954).

> those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth."

United States v. Carolene Products Co., 304 U.S. 144 at 152 n. 4 (1938). Where regulation affects "preferred" or "fundamental" freedoms, the regulation must be essential to serve "compelling State interests" and cannot be supported if merely "rationally related" to a valid public purpose. *Dunn v. Blumenstein*, 405 U.S. 330 (1972); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). Where, then, "fundamental" freedoms are involved, classifications which might invade or restrict them must be closely scrutinized and carefully confined. *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966). Even though the governmental purpose is shown to be appropriately legitimate and substantial, a regulation seeking to achieve that purpose cannot be sustained on attack if that regulation employs means that ". . . broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Keyishian v. Board of Regents of U. of St. of N.Y.*, 385 U.S. 589 at 602 (1967).

The freedoms guaranteed by the First Amendment appear to enjoy a special preference.

> "[T]he usual presumptions supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedom secured by the First Amendment. (Cit.Om.) That priority gives these liberties a sanctity and a sanction not permitting dubious intrusion and it is the character of the right, not of the limitation, which determines what standard governs the choice. (Cit.Om.)

> For these reasons, any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts, might support legislation against attack on due process grounds or not suffice. These rights rest on firmer foundation."

Thomas v. Collins, 323 U.S. 516 at 530 (1945), *reh. denied,* 323 U.S. 819 (1945).[2]

It has been emphasized that "[t]he power of a state to abridge freedom of speech is the exception rather than the rule . . ." *Herndon v. Lowry,* 301 U.S. 242 at 258 (1937) and ". . . only a compelling state interest . . . can justify limiting First Amendment freedoms." *NAACP v. Button,* 371 U.S. 415 at 438 (1963).

On occasion, the Court may find the preference usually accorded to land-use regulation in conflict with the pre-eminence of "preferred freedoms". On those, perhaps, rare occasions

> ". . . it is appropriate that we afford zoning authorities considerable latitude in choosing the means by which to implement [appropriate] purposes. But deference does not mean abdication. This Court has an obligation to ensure that zoning ordinances, even when

2. *See generally, First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978); *United States v. O'Brien,* 391 U.S. 367 (1968); *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964); *NAACP v. Button,* 371 U.S. 415 (1963); *Schneider v. New Jersey,* 308 U.S. 147 (1939).

> adopted in furtherance of such legitimate aims, do not infringe upon fundamental constitutional rights."

Village of Belle Terre v. Boraas, 416 U.S. 1 at 14 (1974), dissenting opinion of Marshall, J. Where a

> ". . . zoning ordinance creates a classification which impinges upon fundamental personal rights, it can withstand constitutional scrutiny only upon a clear showing that the burden imposed is necessary to protect a compelling and substantial governmental interest (cit.om.). And, once it be determined that a burden has been placed upon a constitutional right, the onus of demonstrating that no less intrusive means will adequately protect the compelling state interest and that the challenged statute is sufficiently narrowly drawn, is upon the party seeking to justify the burden. (Cit.Om.)"

Id., 416 U.S. 1 at 18, dissenting opinion of Marshall, J.[3]

Subsequent to its decision in *Village of Belle Terre v. Boraas,*[4] the Court has had occasion to consider whether a land-use regulation impermissibly infringed upon a "fundamental"

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3. It would not appear that the majority of the Court would disagree with the comments of Justice Marshall quoted above. Rather, the majority specifically found, contrary to the view of Justice Marshall, that the ordinance under scrutiny operated to deprive no "fundamental" right guaranteed by the Constitution such as the right of association or any rights of privacy, *Id.,* 416 U.S. at 7, 13. Accordingly, the majority required only that the ordinance be "reasonable, not arbitrary" and that the ordinance bear "a rational relationship to a [permissible] state objective." *Id.,* 416 U.S. at 8.

4. 416 U.S. 1 (1974).

liberty.[5] Only on one of those occasions did the Court answer in the affirmative the threshold question as to whether a "fundamental" right was involved. In *Moore v. City of East Cleveland, Ohio,*[6] the Court found a constitutional right of familial association in privacy rooted in substantive due process.[7] Recognizing that the ordinance in question abridged a fundamental right, the Court then proceeded to apply the analytical standard, at least in spirit, suggested as appropriate by Justice Marshall in *Village of Belle Terre v. Boraas.*[8] East Cleveland's ordinance was shorn of "the usual judicial deference to the legislature" and its asserted governmental interests and the extent to which they were served by the challenged regulation were subjected to careful examination and scrutiny to determine whether the city's needs justified the abridgement of a fundamental right.[9] Despite the city having advanced goals which the Court acknowledged to be legitimate, the ordinance was found lacking.[10] It seems clear, then, that any land-use

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5. *Agins v. City of Tiburon,* ___ U.S. ___, 100 S. Ct. 2138 (1980) (taking of property without just compensation contrary to Fifth Amendment contended); *County Bd. of Arlington Cty., Va. v. Richards,* 434 U.S. 5 (1977) (distinction between residents and non-residents drawn denying Fourteenth Amendment equal protection contended); *Moore v. City of East Cleveland, Ohio,* 431 U.S. 494 (1977) (denial of Fourteenth Amendment due process right protecting family contended); *Young v. American Mini Theatres, Inc.,* 427 U.S. 50 (1976) (denial of First Amendment freedom of expression and Fourteenth Amendment equal protection contended).

6. 431 U.S. 494 (1977).

7. *Id.,* 431 U.S. 499, 502, 504, 507.

8. 416 U.S. 1 (1974).

9. *Moore v. City of East Cleveland,* 431 U.S. at 499, 502.

10. *Id.,* 431 U.S. at 500.

regulation which burdens a "fundamental" right must withstand particularly careful scrutiny to be found valid.[11]

Where the "fundamental" right intruded upon by a land-use regulation is one guaranteed by the First Amendment, the Court's analytical problem has a further dimension — particularly where that right is the guarantee of freedom of speech and expression. Generally, governmental regulation which incidentally burdens First Amendment freedoms can only be sustained

> "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on . . . First Amendment freedoms is no greater than is essential to the furtherance of that interest."

United States v. O'Brien, 391 U.S. 367 at 377.[12] A further reason

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11. "[S]trict scrutiny means that the [classification scheme] is not entitled to the usual presumption of validity, that the State rather than the complainants must carry a 'heavy burden of justification,' that the State must demonstrate that its [classification] system has been structured with 'precision' and is 'tailored' narrowly to serve legitimate objectives and that it has selected the 'less drastic means' for effectuating its objective. . . ."

San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, at 16-17 (1973) (Footnote Omitted).

12. *See also, Young v. American Mini Theatres, Inc.*, 427 U.S. 50, at 79-80 concurring opinion of Powell, J. *Compare Consol. Edison Co. v. Public Service Com'n.*, ____ U.S. ____, 100 S. Ct. 2326, at 2335 n. 9 (1980).

for analytical differentiation arises when the land-use regulation in question constitutes a "prior restraint". For any system of prior restraint comes to the court bearing a heavy presumption against its constitutional validity and in order for it to be held lawful, it must fall within one of the narrowly defined exceptions to the prohibition against prior restraints and must have been accomplished with procedural safeguards that reduce the danger of suppressing constitutionally protected speech. *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546 at 558-559 (1975).[13]

B. The Threshold Question: Has a Fundamental Right Been Abridged by the Borough's Zoning Ordinances?

Before reaching the analytical problem, however, the threshold question of whether a fundamental right is involved must be addressed. The right asserted to have been abridged by the Borough's zoning ordinances is, of course, that of freedom of speech and expression guaranteed by the First Amendment and made applicable to the States by the Fourteenth Amendment to the Federal Constitution.[14] The particular activity engaged in and sought to be engaged in by the appellants which they claim is protected by the First Amendment is their offering to the public live entertainment generally and, in particular, live nude dancing.

> "Each medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it, for each may present its own problem. (Cit.Om.) By its nature, theater usually is the acting out — or singing out — of

13. *See also, Vance v. Universal Amusement Co.,* 445 U.S. 308 (1980); *Brown v. Glines,* 444 U.S. 348, 100 S. Ct. 609 (1980); *Carroll v. Commissioners of Princess Anne,* 393 U.S. 175 (1978); *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1962); *Near v. Minnesota,* 283 U.S. 697 (1931).

14. *Murdock v. Pennsylvania,* 319 U.S. 105 (1943).

the written word, and frequently mixes speech with live action or conduct. But that is no reason to hold theater subject to a drastically different standard. For, as was said in *Burstyn* (Cit.Om.), when the court was faced with a question of what First Amendment standard applies to films,

> '[T]he basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court make freedom of expression the rule. There is no justification in this case for making an exception to that rule.'"

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 at 557-558. The fact that a mode of expression is designed for entertainment purposes does not lessen the importance of that mode as an organ or forum for public opinion. *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495 at 501 (1952). In fact, where a mode of expression has value as entertainment, its importance as a medium for communication is heightened. Accordingly, it should be protected all the more rigorously for "[w]hat is one man's amusement, teaches another's doctrines." *Winters v. New York,* 333 U.S. 507 at 510 (1948).[15]

Expression in general and live entertainment in particular should be entitled to no less rigorous protection because it is sexually explicit, for

> "Sex, a great and mysterious motive force in human life, has indisputably been a subject of

15. Live performances and dance are regularly afforded broad prima facie First Amendment protection. *See California v. LaRue,* 409 U.S. 109, at 130 (1972), dissenting opinion of Marshall, J. and cases cited therein.

> absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern."

Roth v. United States, 354 U.S. 476 at 487 (1957). *See also, Young v. American Mini Theatres, Inc.,* 427 U.S. 50 at 87, dissenting opinion of Stewart, J. Further,

> ". . . much linguistic expression serves a dual communicative function; it conveys not only ideas capable of relatively precise, detached explication but otherwise inexpressible emotion as well. . . . We cannot sanction the view that the constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which practically speaking, may be the more important element of the overall message sought to be communicated."

Cohen v. California, 403 U.S. 15 at 26 (1971). Sexually explicit communication, then, may and often does convey an aesthetic message or emotional message quite apart from a message in the form of an idea.[16] Perhaps subsumed by these considerations,

16. Sexually explicit speech serves as a means of conveying ideas including ideas with political significance where sex, itself, may be part of the message. I. Bengis, *Combat in the Erogenous Zone* (1972); E. Frankfort, *Vaginal Politics* (1974); K. Millett, *The Prostitution Papers: A Quartet for Female Voice* (1971). Sexually explicit speech may be invaluable "as a technical device . . . to awaken, to usher in a sense of reality." Miller, *Obscenity and the Law of Reflection,* 51 Ky. L.J. 577, 587 (1963). *See, e.g., Papish v. Board of Curators,* 410 U.S. 667 (1963); *Kois v. Wisconsin,* 408 U.S. 229 (1972). Even national figures exploit sexually oriented media to increase their audience. *See, e.g.,* Playboy Interview: Jimmy Carter, 23 *Playboy,* November 1976 at 63; Douglas, The Attack on the Right to Privacy, 14 *Playboy,* December 1967 at 189. *See generally,* The Supreme Court, 1975 Term, Harv. L. Rev. 196 (Nov. 1976).

nude dancing has repeatedly been acknowledged to be entitled to First Amendment protection. *Young v. American Mini Theatres, Inc., supra; Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *California v. LaRue, supra.* Accordingly, live entertainment generally and live nude dancing in particular are protected by the First Amendment.

C. The Borough's Ordinances Fail to Meet the *O'Brien* Test.

We turn now to the application of the *O'Brien* standard to the Borough's zoning ordinances. At the outset, the Borough is unquestionably empowered to enact land-use regulations. *Euclid v. Amber Realty Co., supra; Schmidt v. Board of Adjustment of City of Newark*, 9 N.J. 405 (1952); N.J.S. 40:55-30, *et seq.* Throughout this litigation, the Borough has repeatedly maintained, both impliedly and expressly, that its land-use ordinances were originally enacted and subsequently applied to the appellants' conduct to further the beneficent purposes of zoning and for no other purpose.[17] The governmental interests served by land-use regulations are clearly unrelated to the suppression of free expression. Here ends, however, the ability of the Borough's zoning ordinances to meet the *O'Brien* test. Never in this litigation has the Borough identified the specific "important or substantial governmental interest" that is furthered by the total proscription of all forms of live entertainment throughout the length and breadth of the Borough. Apart from its failure to identify the specific interest, the record is totally devoid of support for any contention by the Borough that that interest is "substantial" and is further devoid

17. *See, e.g.*, Respondent's Motion to Dismiss at 7 where the Borough maintains ". . . the ordinance is not aimed at suppressing speech, but is designed to regulate land use within the Borough's boundaries."

of any indication how that obscure interest is served by a ban on all forms of live entertainment.[18]

Even if the Borough were to advance a legitimate and substantial interest which is, in some way, served by its blanket exclusion of live entertainment, the reach of that exclusion must surely render the ordinances invalid for "the incidental restriction on . . . First Amendment freedoms [must be] no greater than is essential to the furtherance of that interest."[19] The Court has repeatedly emphasized

> "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchdown. . . ."

NAACP v. Button, 371 U.S. 415 at 438; *Village of Schaumburg v. Citizens, Etc.,* ____ U.S. ____, 100 S. Ct. 826 at 836 (1980). Should live entertainment in general and live nude dancing in the appellants' adult book store in particular have been established as having an adverse effect on the public health, safety, welfare and morals, surely the Borough is capable of drafting regulations which mitigate acceptably those effects and which do not, at the same time, prohibit operas, dramatic and comedic theatre presentations, musical plays, concerts, chamber music recitals, magic shows, puppet shows, melodramas, vaudeville presentations, ballets, presentations of classical and modern interpretive dance, comedy monologues, circuses, talent and variety shows, and the like.

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18. *Compare, California v. LaRue, supra,* where the promulgation of regulations by the California Department of Alcoholic Beverage Control followed extensive hearings. And *compare, Young v. American Mini Theatres, Inc., supra,* where the record was replete with evidence that Detroit's zoning ordinances were necessary to prevent neighborhood decay and stem crime.

19. *Young v. American Mini Theatres, Inc.,* 427 U.S. 50 at 80.

The Borough suggests that, practically speaking, its complete proscription of a distinct medium of expression is a negligible burden, if any, on First Amendment freedoms. The Borough asserts

> "live entertainment is available throughout Camden County as is nude dancing in certain locations. Because the Borough of Mount Ephraim has elected not to allow live entertainment within its boundaries cannot give petitioners a boot strap argument that this violates its First Amendment rights."[20]

The Court, however, has acknowledged that means of expressing ideas are not interchangeable. Accordingly, it has guarded what the speaker has considered to be the most effective means for his communication.[21] The comments of Justice Black are particularly appropriate

> "This reason for abridgement strikes me as being on a par with holding that governmental suppression of a newspaper in a city not violate First Amendment because there continue to be radio and television stations. First Amendment freedoms can no more be validly taken away by degrees than by one fell swoop."

NLRB v. Fruitpackers Local 760, 377 U.S. 58 at 80 (1964) concurring opinion of Black, J. Clearly, one is ". . . not to have

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20. Respondent's Motion to Dismiss at 10.

21. *See, e.g., Cohen v. California,* 403 U.S. 15 at 26 (1971); *Kovacs v. Cooper,* 336 U.S. 77 at 87 (1949). *See also, Linmark Associates, Inc. v. Township of Willingboro,* 431 U.S. 85 (1977) questioning whether a total prohibition of "for sale" and "sold" signs would leave open ample alternative channels for communications.

the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. Town of Irvington,* 308 U.S. 147 at 163 (1939).[22] In accord with these principles, the Court clearly telegraphed in both *LaRue* and *Young* that a regulation which constitutes a pervasive condemnation cannot be upheld. Justice Rehnquist writing for the majority in *LaRue* observed

> "While we agree that at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression, a critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in establishments that it licenses to sell liquor by the drink."[23]

In *Young,* the Court considered the respondents' argument that Detroit's ordinances were invalid as prior restraints on free speech. Justice Stevens writing for the plurality wrote

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22. In *Schneider,* the Court invalidated an ordinance prohibiting the distribution of handbills to pedestrians on public streets despite the argument that the distributor could effectively exercise his First Amendment rights in some other form. *See also, Southeastern Promotions, Ltd. v. Conrad, supra,* where the Court determined that an exhibitor that wished to lease a theater belonging to the City for the purposes of exhibiting "Hair" could not be so precluded. The Court stated the fact that the exhibitor might have access to some other theater in the City was "of no consequence" even if that other facility would serve as well as the City auditorium. And further *see Spence v. Washington,* 418 U.S. 405 (1974) where the Court summarily rejected the argument of the Washington Supreme Court that the conviction of the appellant for improperly using an American flag by emblazoning a peace symbol across the front should stand because there were "thousands of other means available to [him] for the dissemination of his personal views" and the restriction of his freedom of expression "miniscule and trifling".

23. *California v. LaRue,* 409 U.S. 109 at 118.

> "The ordinances are not challenged on the ground that they impose a limit on the total number of adult theaters which may operate in the City of Detroit. There is no claim that distributors or exhibitors of adult films are denied access to the market or, conversely, that the viewing public is unable to satisfy its appetite for sexually explicit fare. Viewed as an entity, the market for this commodity is essentially unrestrained."[24]

The *Young* Court found that what was ultimately at stake was nothing more than a limitation on the place where adult films might be exhibited in the City of Detroit. It cautioned, however

> "The situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech."[25]

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24. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 at 62.

25. *Id.* at 71 n. 35.

In point of fact, the district court which originally considered the Detroit ordinance found invalid a provision which prohibited the location of any regulated use within 500 feet of any dwelling or rooming unit. That court said "There are few, if any, locations other than industrial areas in the downtown commercial area of Detroit where there is not a single dwelling or living unit within 500 feet. Thus, the effect of the restriction is an almost total ban on uses conceded by the defendants to be lawful. While such an extreme effect might not render the restriction invalid under the equal protection clause if the City had demonstrated that its compelling interest was promoted thereby no such showing has here been made." *Nortown Theatre Incorporated v. Gribbs*, 373 F. Supp. 363 at 370 (E.D. Mich. 1974). For the same result in substantially identical circumstances, *see Bayside Enterprises, Inc. v. Carson*, 450 F. Supp. 696 (M.D. Fla. 1978). *Also see*, Goldman, *A Doctrine of Worthier Speech: Young v. American Mini Theatres, Inc.*, 21 St. Louis Univ. Law J. 281 at 294 n. 104 (1977).

Had the Borough's ordinances been drafted so as to proscribe only live nude dancing, it seems eminently unlikely that the ordinances could be sustained. The ordinances, of course, had been interpreted and applied by the Borough as disallowing all forms of live entertainment. Neither the Camden County Court, nor the Superior Court of New Jersey, Appellate Division were inclined to construe the Borough's ordinances more narrowly (JS7a, 14a). It cannot be seriously contended that ordinances which prescribe criminal penalties for any violation of their proscription of live entertainment do not constitute a real and substantial deterrent effect on legitimate expression. Their invalidity then is quite patent. *See Erznoznik v. City of Jacksonville,* 422 U.S. 205 (1975).

D. The Borough's Ordinances Constitute an Impermissible Prior Restraint.

From the outset, the appellants have contended that the Borough's land-use regulations imposed a prior restraint on protected expression — for any use of their premises to offer live entertainment must be preceded by the grant by the Borough of a variance.[26]

> "Time and again, the Court has underscored the principle that restraints upon communication must be hedged about by procedures that

26. There would appear to be no necessity for the appellants to have first sought a variance before asserting their constitutional claims before this Court. The appellants' first notification of the unusual interpretation by the Borough of his zoning ordinances was their receipt of the criminal complaints which originated these proceedings. There is no New Jersey law which would require the appellants, in this context, to first seek a variance before presenting constitutional challenges to zoning ordinances in a criminal proceeding. Further, the courts below entertained and decided all of the appellants' constitutional arguments. Moreover, the inference is inescapable that, had the appellants sought a variance, the Borough would have denied their application. *See Moore v. City of East Cleveland, Ohio,* 431 U.S. 494 at 497 n. 5.

> guarantee against infringement of protected expression and that eliminate the play of discretion that epitomizes arbitrary censorship. (citations omitted) . . . [S]pecific safeguards . . . are indispensable if a system of prior approval is to avoid First Amendment pitfalls. These include (1) the requirement that the burden of justifying censorship fall upon the censor (citations omitted), (2) the condition that the administrative suppression must be subject to speedy judicial review (citations omitted), and (3) the rule that those whose First Amendment interests are at stake be given a notice and an opportunity to be heard during suppression proceedings (citations omitted)."

Brown v. Glines, 444 U.S. 348, 100 S. Ct. 594 at 612, dissenting opinion of Brennan, J. and cases cited therein. As noted *ante* any system of prior restraints comes to the Court bearing a heavy presumption against its validity. *See, e.g., Bantam Books, Inc. v. Sullivan, supra.* Further, a prior restraint, to be valid, must fit into one of a few limited exceptions. *Near v. Minnesota, supra.*[27] It is evident, even on cursory examination, that the Borough's zoning ordinances when read in conjunction with the applicable New Jersey statutes are unable to "avoid First Amendment pitfalls".

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27. *Near v. Minnesota, supra* (wartime secrets); *Times Film Corp. v. Chicago,* 365 U.S. 43 (1961) (prior censorship of films); *Poulos v. New Hampshire,* 345 U.S. 395 (1953) and *Cox v. New Hampshire,* 312 U.S. 569 (1941) (reasonable time, place and manner restrictions); *Cameron v. Johnson,* 390 U.S. 611 (1968) and *Adderly v. Florida,* 385 U.S. 39 (1966) (use of a facility primarily serving a competing use); *Kovacs v. Cooper,* 336 U.S. 77 (1949) (rights of individuals in surrounding areas); *Lehman v. Shaker Heights,* 418 U.S. 298 (1974) (captive audience); *Cox v. Louisiana,* 379 U.S. 536 (1965) (maintenance of social order).

Where a land owner in New Jersey wishes to put his property to a use that is legislatively prohibited he must obtain a variance. *Verona Inc. v. Mayor and Council of West Caldwell,* 49 N.J. 274 (1967). On an application for a variance, the applicant has the burden of proving that his situation is a particular case, there are special reasons compelling a determination in his favor and that the variance might be granted without substantial detriment to the public good and would not substantially impair the intent and the purpose of the zone plan or zoning ordinance. N.J.S. 40:55-39[28]; *Home Builders*

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28. The complete text of N.J.S. 40:55-39 reads as follows:

"The board of adjustment shall have the power to:

a. Hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision or refusal made by an administrative official or agency based on or made in the enforcement of the zoning ordinance.

b. Hear and decide, in accordance with the provisions of any such ordinance, requests for special exceptions or for interpretation of the map or for decisions upon other special questions upon which such board is authorized by any such ordinance to pass.

c. Where by reason of exceptional narrowness, shallowness or shape of a specific piece of property, or by reason of exceptional topographic conditions, or by reason of other extraordinary and exceptional situation or condition of such piece of property, the strict application of any regulation enacted under the act would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon the owner of such property, to authorize, upon an appeal relating to such property, a variance from such strict application so as to

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Ass'n v. Borough of Paramus, 7 N.J. 335 (1951). The refusal of the board of adjustment to recommend a variance may be challenged only by means of a suit in lieu of prerogative writ in the Superior Court of New Jersey. Rule 4:69-1; 4:69-6(b).[29] The

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(Cont'd)

> relieve such difficulties or hardship; provided, however, that no variance shall be granted under this paragraph to allow a structure or use in a district restricted against such structure or use.
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> d. Recommend in particular cases and for special reasons to the governing body of the municipality the granting of a variance to allow a structure or use in a district restricted against such structure or use. Whereupon the governing body or board of public works may, by resolution, approve or disapprove such recommendation. If such recommendation shall be approved by the governing body or board of public works then the administrative officer in charge of granting permits shall forthwith issue a permit for such structure or use.
>
> No relief may be granted or action taken under the terms of this section unless such relief can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance."

N.J.S. 40:55-39 was subsequently repealed by L. 1975, c. 291 §80, eff. Aug. 1, 1976 and replaced by N.J.S. 40:55D-70 which, for the purposes of this appeal, is substantially similar.

29. The complete text of Rule 4:69-1 reads as follows:

> "Review, hearing and relief heretofore available by prerogative writs and not available under R. 2:2-3 shall be afforded by a civil action in the Law Division of the Superior Court. The complaint shall bear the designation 'In Lieu of Prerogative Writs'."

(Cont'd)

applicant may secure relief only by demonstrating that the board's action was arbitrary and capricious amounting to an abuse of its discretion. *Rogoff v. Tufariello,* 106 N.J. Super. 303 (App. Div. 1969). An affirmative recommendation by the board of adjustment is reviewed by the governing body of the municipality and it is the governing body that makes the ultimate determination on the issue of granting the requested variance. *Rogoff v. Tufariello, supra;* N.J.S. 40:55-39. The refusal of the governing body to grant the requested variance is reviewable by the Superior Court of New Jersey in an action in lieu of prerogative writ. Rule 4:69-1; 4:69-6(b).

It is quite obvious that New Jersey's use variance application procedures could never hope to satisfy the Court's strict requirements for a permissible system of prior restraints. It

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(Cont'd)

Rule 4:69-6(b), in pertinent part, reads as follows:

> "No action in lieu of prerogative writs shall be commenced . . . (3) to review a determination of a planning board or board of adjustment, or a resolution by the governing body or board of public works of a municipality approving or disapproving a recommendation made by the planning board or board of adjustment, after 45 days from the publication of a notice once in the official newspaper of the municipality or a newspaper of general circulation in the municipality; provided, however, that if the determination or resolution results in a denial or modification of an application, after 45 days from the publication of the notice or the mailing of the notice to the applicant, whichever is later. The notice shall state the name of the applicant, the location of the property and in brief the nature of the application and the effect of the determination or resolution *(e.g.,* 'Variance-Store in residential zone denied'), and shall advise that the determination or resolution has been filed in the office of the board or the municipal clerk and is available for inspection. . . ."

Neither Rule has been amended.

is the applicant and not the Borough who bears the burden of proof. The applicant's burden is an especially heavy one in that he is required to demonstrate special reasons and to show affirmatively that the grant of the variance will neither do substantial detriment to the public good nor substantially impair the intent and purpose of the zone plan and zoning ordinance.[30] Although a prompt judicial determination is possible, it is extremely unlikely. There is no requirement that the board of adjustment hear a filed application within any particular period of time, nor is there any requirement that the board, once having heard the application, render its decision within any particular period of time. Likewise, there is no requirement that the governing body consider an affirmative recommendation by the board of adjustment within a particular time or, once having considered the recommendation, render its own resolution within a particular period of time. A determination by the Superior Court in the context of a suit in lieu of prerogative writ could be delayed interminably by administrative manipulation by the board and the governing body.[31] The Borough's system of prior restraints could hardly be more complete in its violation of the principles of *Freedman v. Maryland,* 380 U.S. 51 (1965) and *Blount v. Rizzi,* 400 U.S. 410 (1971). *See Brown v. Glines,* 444 U.S. 348, 100 S. Ct. 594 at 612; *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546 at 559-560.

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30. N.J.S. 40:55-39d.

31. As a hypothetical example, an applicant might seek a variance to present a satirical debate between two bogus political candidates but in which real issues and the positions of actual political candidates are aired. The Borough might effectively suppress the live entertainment sought to be offered by simply administratively dragging its feet until election day has come and gone.

E. The Borough's Ordinances are a Subterfuge for the Suppression of Protected Expression.

Apart from the validity of the Borough's zoning ordinances, its sincerity in interpreting and applying those ordinances to the conduct of the appellants should be considered. In proceedings before, now, five separate judicial tribunals the Borough has never identified any distinct interest which is somehow served by a total prohibition on all live entertainment within its boundaries. At least so far as counsel for appellants have been able to discover, the Borough's absolute proscription is completely without precedent. Any claim by the Borough that the measure is somehow necessary (taking into consideration its severe impact on constitutionally protected expression) cannot be ingenuously accepted at face value. The Borough appears to be quite unconcerned about the long-standing, unamortized, non-conforming use of at least six other establishments for the purpose of live entertainment (JS4a-5a, 7a). Notwithstanding, however, the existence or non-existence of any legitimate governmental purpose served by the live entertainment ban, the Borough's ordinances are clearly invalid. They are unable to withstand *Moore's* careful examination and scrutiny, unable to pass the *O'Brien* test and violate virtually every principle of *Freedman* and *Blount*.[32] Considering the foregoing in context — that is, recalling that the appellants are the owners and operators of an adult book store — one would be hard-pressed not to recognize the earmarks, in the conduct of the Borough, of a somewhat transparent mask for the harassment of the appellants and the suppression of distasteful expression. As noted on the frontispiece *ante*, Justice Stevens has cautioned

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32. Should the Borough's governmental interest served by the exclusion of live entertainment be disclosed, it is doubtful that the ordinances could even pass the *Euclid* test. *See Moore v. City of East Cleveland, Ohio*, 431 U.S. 494 at 520, concurring opinion of Stevens, J.

> ". . . courts must be alert to the possibility of direct rather than incidental effect of zoning on expression, and especially to the possibility of using the power to zone as a pretext for suppressing expression. . . ."

Young v. American Mini Theatres, Inc., 427 U.S. 50 at 84.[33] Where the power to zone is found to have been such a pretext, those zoning ordinances should be most forcefully struck down.

II.

THE ZONING ORDINANCES OF THE BOROUGH OF MOUNT EPHRAIM AS INTERPRETED AND APPLIED TO THE APPELLANTS ARE INVALID AS OFFENSIVE TO THE APPELLANTS' FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS AND EQUAL PROTECTION IN THAT THEY HAVE BEEN ARBITRARILY APPLIED.

The Borough's zoning ordinances as interpreted and applied, permit the appellants to maintain coin-operated amusement booths in which patrons may individually view films. At the same time, however, those ordinances have been interpreted and applied to prohibit coin-operated amusement booths which patrons may individually view a live nude dancer.

Land-use regulations are required to be given deference by the Court on review and, before such a regulation can be declared unconstitutional it must be demonstrated that it is ". . . clearly arbitrary and unreasonable, having no substantial relationship to the public health, safety, morals, or general welfare." *Euclid v. Amber Realty Co.*, 272 U.S. 365 at 395. *Also*

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33. *See, e.g., E & B Enterprises v. City of University Park*, 449 F. Supp. 695 (N.D. Texas 1977).

see, Moore v. City of East Cleveland, Ohio, supra; Nectow v. Cambridge, supra. Stacking the Borough's ordinances, as interpreted and applied, against the *Euclid* test, it is apparent that they fall short of the mark. The two forms of amusement are so similar in their operation and character as to be for the purposes of zoning, indistinguishable. There is nothing about the second form of amusement, which is, in the least, any more inimical to the purposes of the Borough's zoning ordinances than the first. The Borough has failed totally to offer any reason in justification for the distinction but, rather, has woodenly repeated, again and again that the ordinance should be upheld because it is a zoning ordinance. The Borough has failed totally to explain the need for a rule which would allow coin-operated amusement booths in which patrons might individually view films but not coin-operated amusement booths in which patrons may individually view a live nude dancer performing beyond a glass panel. Since the Borough has imposed by its rule this arbitrary distinction unrelated to any demonstrated substantial relation to the public health, safety, morals, or general welfare and since its rule cuts so deeply into the fundamental right of free expression, the Borough's ordinances, as interpreted and applied, must fall under the limited standard of review of zoning decisions preserved and *Euclid* and *Nectow. See Moore v. City of East Cleveland, Ohio,* 431 U.S. 494 at 520-521, concurring opinion of Stevens, J.

CONCLUSION

For the foregoing reasons and based upon the foregoing authorities, the appellants submit that the Zoning Ordinances of the Borough of Mount Ephraim as interpreted by the Borough and the Camden County Court and as applied to them are constitutionally invalid as suppressive of their First Amendment freedoms of speech and expression and as offensive to their Fourteenth Amendment guarantees of due process and equal protection. Accordingly, the appellants request that this Court declare the Borough's zoning ordinances as interpreted by the Borough and the Camden County Court as applied to them to be invalid and they further request that their convictions be reversed.

Respectfully submitted,

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s/ Lewis H. Robertson

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CORRECTED COPY

No. 79-1640

In The

Supreme Court of the United States

October Term, 1980

JAMES F. SCHAD, 613 CORPORATION and JULIETTE ANN DI LUCIANO,

Appellants,

vs.

BOROUGH OF MOUNT EPHRAIM,

Appellee.

On Appeal from the Supreme Court of New Jersey

BRIEF FOR APPELLEE

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APPEAL DOCKETED APRIL 16, 1980
PROBABLE JURISDICTION NOTED OCTOBER 14, 1980

QUESTIONS FOR REVIEW

1. Must each municipality provide land for the commercial exploitation of every activity which is arguably First Amendment protected?

2. In balancing the police power of the State as expressed in a zoning ordinance against an incidental impact on commercial speech:

(A) Is the burden upon the State to establish the validity of its legislative scheme within a criminal prosecution? If so,

(B) Has that burden been obviated by the stipulation in this case? If not,

(C) Has that burden been met? If not,

(D) What is the proper action for this Court to take?

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On Appeal from the Supreme Court of New Jersey

BRIEF FOR APPELLEE

OPINIONS BELOW

The appellee adopts the recitation of the opinions below as set forth on pages 1 and 2 of the appellants' brief.

JURISDICTION

The appellee submits that this Court is without jurisdiction over this matter as set forth in the jurisdictional statement of the

appellee's motion to dismiss the appellants' appeal at pages 3 and 4 of that motion, and as argued in Points I through IV of that motion found at pages 7 through 12, inclusive.

ORDINANCES AND CONSTITUTIONAL PROVISIONS INVOLVED

Assuming there are constitutional issues before this Court, the appellee adopts the ordinances and constitutional provisions cited by the appellant at pages 2, 3 and 4 of the brief for the appellants.

STATEMENT OF THE CASE

A. Statement of the Facts

The appellee adopts the Statement of Facts as set forth in the appellants' brief.

B. Procedural History

This action began with complaints by the Borough of Mount Ephraim charging James F. Schad, 613 Corporation and Juliette Ann DiLuciano with the use of the premises of 613 Corporation for a use contrary to the provisions of the Borough of Mount Ephraim Zoning Ordinance Section 99-15B. At that time, counsel for the respective parties entered into a stipulation of seven legal issues and six factual statements which are set forth both in the opinion of the Camden County Court at page 1a of the appendix of the appellants' appeal. The Municipal Court of the Borough of Mount Ephraim found the appellants guilty of the various charges, including violation of the Borough's zoning ordinance.

With respect to the six stipulated facts, the parties failed to agree on number 4 and testimony was taken in the Municipal

Court from the Chief of Police and Building Inspector of the Borough of Mount Ephraim on the issue of the Borough's alleged selective enforcement of the zoning ordinance, along with testimony on the issue of whether other forms of live entertainment in the Borough were either nonconforming or accessory uses. No other testimony was produced by either party.

The appellants filed a notice of appeal which was heard by the Camden County Court. That court held that there was no selective enforcement of the Borough's zoning ordinance, nor did it offend the First Amendment.

The Superior Court of New Jersey, Appellate Division, reviewed the opinion and record before the Camden County Court and affirmed the opinion of the Camden County Court essentially for the reasons contained in that opinion.

The New Jersey Supreme Court declined to grant the petitioners-appellants' petition for certification which by virtue of New Jersey Court Rule 2:12-9, also effected an automatic dismissal of the appeal.

The appellants then filed an appeal from the Supreme Court of New Jersey and a petition for writ of certiorari to the Supreme Court of the United States. This Court noted probable jurisdiction on October 14, 1980.

SUMMARY OF ARGUMENT

The matter before the Court concerns a municipality's power to promulgate and enforce its zoning ordinance; this is *not* a First Amendment case.

Clearly a municipality has the right to promulgate rules and regulations which serve to regulate and control uses within its

boundaries. In some situations, as in the present, these regulations may not provide land for all uses. No one would question the right of a zoning body to ban a slaughter house or any other use which produces a noxious odor in a residential zone. This is because zoning ordinances concern themselves with making sure that the pig is in the barnyard and not in the parlor.

Any use of property is, in a sense, a form of expression, whether it is the slaughter house or the printing presses of the local newspaper. But clearly, every use of property is not a form of speech entitled to the protection of the First Amendment. Neither the failure to include land within its commercial zone for the commercial exploitation of live entertainment in general and live nude dancing specifically is violative of the First Amendment.

The burden, if any, has either been obviated or met by the appellee. Assuming, however, that there was an omission in the State's proofs, a remand or reversal would be the appropriate remedy as opposed to a finding of unconstitutionality.

ARGUMENT

I.

Each municipality need not devote land to every commercial enterprise which is engaged in activity which is arguably constitutionally protected.

Each municipality need not devote land to every commercial enterprise which is engaged in activity which is arguably constitutionally protected. This is true on both authority and reason.

Numerous decisions in New Jersey and elsewhere sustain the legislative will to not be required to provide land for every

use. *Vickers v. Gloucester Township Committee,* 37 N.J. 232 (1962).

This is nothing more than a recognition that the utilization of land within a community determines its character. The whim of the landowner is therefore made subservient to the rights of the residents to have some voice in the shaping of that character through their local elected representatives in the creation of a comprehensive zoning ordinance. Were the will of the community at large to be excluded from this basic decision-making process, even with respect to free speech challenges only, would result in the excesses which brought land use legislation into being.

This is so because, as in this case, the ingenuity of man is such, that every zoning regulation may be described in First Amendment language.

No one would argue that newspapers are not included within the penumbra of the First Amendment. Nor would anyone argue that newspapers cannot exist without the large "factories", the successors of the small print shops, which "manufacture" our great daily papers. The appellants' argument as applied to the above hypothetical situation would override the legislative decision that such a land use would be inappropriate with respect to any parcel of land intended for this use by the owner.[1] To carry the argument further, the pig farmer would argue that to "proclaim" his affection for those much maligned creatures, he has established a home for them on a piece of ground newly acquired in a residential zone; and his partner, in this commercially viable enterprise, would "announce" his opinion concerning those same beasts by establishing a slaughter

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1. Presumably, even if the land were zoned residential, the fact that the zone is labeled commercial is of no moment so long as the ordinance is construed to not permit the desired, arguably free speech, use.

house next door. What of the homeowner who faces his house differently from all other houses to "express" his attitude toward the beneficience of the sun, or the person who wants to build a starkly modern home in a colonial community to "voice" that a sharp division with the past is in the national interest. Residential developers would argue that building at a density of twenty units to the acre, as opposed to five, "states" their position with respect to togetherness. Chaos would reign.[2]

Just because opera and libraries are constitutionally protected does not mean that there are not locations inappropriate for opera houses and libraries. The political subdivisions of this nation are not, nor should they be, uniform. Some contain only one zone and it is residential. *See, for example, Valley View Village v. Proffet,* 221 F. 2d 412 (6th Cir. 1955) wherein commercial uses were permissibly excluded. *Also see, Euclid v. Ambler Realty,* 272 U.S. 365 (1926), wherein industrial uses were excluded. People should be free to choose to live in a community which expresses their conception of the "good life", and people within communities should have the power to exercise some control over their destinies.

This power does not cease to exist at the point that a regulation can be described as a prohibition.[3] As stated in *Metromedia v. City of San Diego,* 164 Cal. Rptr. 510 (1980), at p. 518:

> "The distinction between prohibition and regulation in this case is one of words and not

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2. Municipal governments already overwhelmed by the task of creating a comprehensive zoning ordinance would be immobilized if they had to provide for all arguably constitutionally-protected activity and the failure to do so should not invalidate their efforts.

3. Appellee would describe the ordinance as a regulation of commercial entertainment, one which permits all forms other than live.

substance. 'Every regulation necessarily speaks as a prohibition.' (*Goldblatt v. Hempstead* (1962) 369 U.S. 590, 592, 82 S. Ct. 987, 989, 8 L.Ed.2d 130.) In the present case, for example, plaintiffs describe the ordinance as a prohibition of off-site advertising, while the city describes it as a regulation of advertising, one which limits advertising to on-site signs. Surely the validity of the ordinance does not depend on the court's choice between such verbal formulas.

Rather than strive to develop a logical distinction between 'regulation' and 'prohibition' and to find themselves embroiled in language rather than fact, courts of other jurisdictions in recent decisions have held that a community can entirely prohibit off-site advertising. (*John Donnelly & Sons v. Mallar,* supra, 453 F. Supp. 1271; *Murphy, Inc. v. Westport* (1944) 131 Conn. 292, 40 A.2d 177; *John Donnelly & Sons, Inc. v. Outdoor Advertising Bd.,* supra, 369 Mass. 206, 339 N.E.2d 709; *Suffolk Outdoor Adv. Co., Inc. v. Hulse,* supra, 43 N.Y. 2d 483, 402 N.Y.S. 2d 368, 373 N.E.2d 263; *Matter of Cromwell v. Ferrier,* supra, 19 N.Y. 2d 263, 279 N.Y.S. 2d 22, 225 N.E.2d 749.) These decisions fall within the general principle that a community may exclude any or all commercial uses if such exclusion reasonably relates to the public health, safety, morals or general welfare. (*Town of Los Altos Hills v. Adobe Creek Properties, Inc.,* (1973) 32 Cal. App. 3rd 488, 502-504, 108 Cal. Rptr. 271, and cases there cited; see *Associated Home Builders etc., Inc. v. City of Livermore,* supra, 18 Cal. 3d 582, 606, fn. 23, 135 Cal. Rptr. 41, 557 P.2d 473.) As the Oregon Supreme Court

> explained in *Oregon City v. Hartke,* supra, 240 Or. 35, 400 P.2d 255, 'It is within the police power of the city wholly to exclude a particular use if there is a rational basis for the exclusion. . . .' It is not irrational for those who must live in a community from day to day to plan their physical surroundings in such a way that unsightliness is minimized. The prevention of unsightliness [or the promotion of other legitimate state interests] by wholly precluding a particular use within the city may inhibit the economic growth of the city or frustrate the desire of someone who wishes to make the proscribed use, but the inhabitants of the city have the right to forego the economic gain and the person whose business plans are frustrated is not entitled to have his interest weighed more heavily than the predominant interest of others in the community."

In *Young v. American Mini Theatres,* 427 U.S. 15 (1976), this Court sustained a time, place and manner regulation of commercial speech for the City of Detroit. That same ordinance if adopted by many municipalities would prohibit entirely all such regulated activity. Indeed, there are many municipalities where there is no land not within 500 feet of a residence. Implicit in the *Young* decision is that Detroit could prohibit these uses in the residential areas of the city. Those residential areas are indistinguishable from many municipalities located in a large market area.[4]

It would seem to be the inescapable conclusion that whether a municipality must devote some land to a particular use must of

4. The Borough of Mount Ephraim, New Jersey, is one of a number of municipalities comprising the County of Camden, which is located directly across a river from the City of Philadelphia, Pennsylvania.

necessity depend upon a factual analysis of the pecularities of the land itself, the municipality in which the land is situate, and the market area surrounding the municipality.

Since all regulations of land use may be posited so as to present First Amendment issues, it would not be wise to adopt a mechanistic approach to the resolution of the inadvertent collision of the zoning power and its incidental impact on commercial speech. To elevate either at the expense of the other must surely lead to bizzare and unwanted results. Each case must be analyzed in the factual context in which it is presented and a determination of facial invalidity of the ordinance in question is not warranted.

II.

The State does not have the burden of proof within the confines of a criminal prosecution of establishing the validity of its statute.

The police power of the State emanates from the sovereignty of the State. As direct descendants of the King, the State has the right and obligation to legislate for the promotion of the public health, safety, morals and general welfare. The power to zone is delegated to the local political subdivision of the State under a mandate to promote the welfare of the local citizenry. Pursuant to the New Jersey Constitution and the legislative delegation contained at N.J.S. 40:55-30, *et seq.*[5], the

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5. This statute has since the original complaint been repealed by L. 1975, C. 290, and replaced by N.J.S. 40:55D-62, which is substantially similar to the source statute. The full text of N.J.S. 40:55-30 is as follows:

> "Any municipality may by ordinance, limit and restrict the specified districts and may regulate therein, buildings and

(Cont'd)

Borough of Mount Ephraim adopted Chapter 99 of its municipal ordinances, which deals with zoning.

When such a comprehensive legislative scheme is created, it carries with it a strong presumption of validity. New Jersey Constitution, Article IV, Section 7, paragraph 11.[6] To protect this presumption, a party challenging such legislation bears the burden of proving that either the legislation is not related to a legitimate police power objective or that the legislation is

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(Cont'd)

> structures according to their construction, and the nature and extent of their use, and the nature and extent of the uses of land, and the exercise of such authority, subject to the provisions of this article, shall be deemed to be within the police power of the State. Such ordinance shall be adopted by the governing body of such municipality as hereinafter provided, except in cities having a board of Public Works, and in such cities shall be adopted by said Board.
>
> The authority conferred by this article shall include the right to regulate and restrict height, number of stories, and sizes of buildings, and other structures, the percentage of lot that may be occupied, the sizes of yards, courts, and other open spaces, the density of population, and the location and use and extent of use of buildings and structures and land for trade, industry, residence, or other purposes."

6. The New Jersey Constitution, Article IV, Section 7, paragraph 11, provides:

> "The provisions of this Constitution and any law concerning municipal corporations formed for local government, or concerning counties, shall be liberally construed in their favor. The powers of counties and such municipal corporations shall include not only those granted in express terms, but also those of necessary or fair implication, or incident to the powers expressly conferred, or essential thereto, and not inconsistent with or prohibited by this Constitution or by law."

unreasonable, arbitrary or capricious. *Hyland v. Morris Township,* 130 N.J. Super. 471 (App. Div. 1974), *aff'd,* 66 N.J. 31 (1974); *Metromedia, Inc. v. City of San Diego,* 164 Cal Rptr. 510, *cert. granted,* ___ U.S. ___(1980); *McQuillen,* Mun. Corp., §25.296.

The regulation of land use is so related to the public's health, safety, morals and general welfare that municipalities are empowered to enact zoning ordinances.

One provision of the zoning ordinance in question enumerates a number of retail and service businesses for which land in its commercial zone may be put to use (Mount Ephraim Zoning Ordinance 99-15B). Another provision prohibits all uses not so permitted therein (Mount Ephraim Zoning Ordinance §99-4). Absent in this recitation of permitted uses are any commercial establishments customarily devoted to offering to the public live entertainment, such as theatre, sports arenas, opera houses, etc. It is clear, therefore, and the trial court held, that land in this zone may not be so utilized.[7] (Opinion of Camden County Court, p. 6a of appellants' appeal).

Even a cursory reading of the permitted uses reveals that they are designed to permit those businesses which are necessary to serve the immediate needs of this small primary residential community. Certainly, it cannot be seriously contended that this is an irrational scheme.[8]

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7. The Borough's zoning ordinance creates two other zones, both of which are residential.

8. This is true even without reference to the problems which would be caused by the omitted uses, such as large crowds, parking, extra police protection, extra medical facilities required, removal of trash, and other problems inherent in the omitted uses. Appellant's argument would impose upon the Borough not only its use, but the other omitted uses such as the opera hall, sports arena, and theatre as well.

Accordingly, the ordinance in question is entitled to the presumption of validity and its procedural safeguard, which places the burden of proving its invalidity upon the appellants herein. This is the general rule.

The Bill of Rights was adopted to secure to the citizenry those great rights which are indispensable to freedom. Prime among them are the rights found in the First Amendment and specifically, the right of free speech. Appellants would suggest that so important is the right of free speech that in its protection, an exception is made to the general rule that a party attacking the legislative scheme bears the burden. However, this is not so. Also, the mere incantation of the First Amendment does not make this a First Amendment case. This is a zoning case!

In a criminal prosecution, the State is not required to prove the constitutional validity of the statute. This should be true even if the validity is raised by the defendant upon motion and brief. The presumption of validity surrounding the exercise of the police power, through a statute, is sufficient to impose upon the defendant the burden of proof, as previously stated. This would be especially true of legislation designed to regulate areas within the police power which may have an incidental impact on the commercial exploitation of speech.[9]

The thrust of the ordinance in question being related to land use and not speech, should in the absence of facts produced by the defendant showing it to be a sham of misdirection, be sufficient to establish the necessary nexus and rationality of the legislative scheme in a criminal prosecution. Were this not so,

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9. Appellee uses the word "exploitation" throughout with absolutely no derogatory connotation. Appellee uses that word in its definition as follows: "To turn to practical account; utilize for profit" (in the way that the Metropolitan Opera Company exploits opera or the Bolshoi Ballet Company exploits ballet). The American College Dictionary, Random House, 1957.

the State would have an impossible burden to convict a defendant of any offense from murder to bank robbery to speeding.

It is no more to be expected of a municipality to prove the validity of its legislation in a prosecution under its zoning ordinance than for the State to have to prove the validity of its statutes with respect to murder, bank robbery or speeding, even as to a defendant who, by motion supported by brief, argues he wanted to express an opinion of John Lennon's music, a 21-½% prime interest rate, or the 55 miles per hour speed limit.

Additionally, assuming the validity of the scheme were sustained in one prosecution that would hardly discourage the next defendant from raising the same issue. On how many occasions must the validity of the legislative scheme be affirmatively proven and with respect to how many challenges in addition to speech. What of freedom of the press, religion, assembly and redress of grievances, and we have only exhausted the First Amendment. Criminal trials already unwieldy would receive their death blow. The power of government to bring a transgressor to justice would succumb to the onslaught of the well-financed, ingenious defense attorney.

This is especially true when viewed in relation to the numerous other remedies that were available to the appellants. He could have:

1. Sought a variance, N.J.S. 40:55-39[10];

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10. The complete text of N.J.S. 40:55-39 is set forth in appellants' brief at footnote 28.

2. Sought review by way of declaratory judgment, N.J.S. 2A:16-50, *et seq.*[11]; or

3. Brought a chancery action to enjoin the enforcement of the ordinance.[12]

All of the above alternatives would allow for the creation of a record containing facts upon which a court could rule on the ordinance outside of the ambit of the actual criminal proceeding.

In the absence of any facts in the record upon which a finding of unconstitutionality can be predicated, the ordinance must be deemed valid. If, however, the burden is on the State, we are led to the next point.

III.

Counsel's stipulation relieved the appellee of any obligation of proving the validity of its ordinance.

The stipulation[13] of counsel in this case relieved the State of

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11. N.J.S. 2A:16-53 provides:

> "A person interested under a deed, will, written contract, or other writing constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder."

12. New Jersey Court Rules 4:52-1, *et seq.*

13. The full text of the stipulation is as follows:

Issues

"1. Is live entertainment permitted under the zoning ordinances of the Borough of Mount Ephraim in a C zone?

(Cont'd)

(Cont'd)

2. Is defendant's live nude dancing protected by the First Amendment?

3. Has the Borough of Mount Ephraim engaged in selective enforcement of its zoning ordinances?

4. May defendant place a new legend upon its obliterated non-conforming sign advertising live nude dancing?

5. Must defendant secure a permit to repaint the sign with a new legend?

6. May defendant replace the old legend from its obliterated non-conforming sign?

7. Must defendant secure a permit to return the old legend?"

Facts

"1. Defendant opened for business at its present location in a C zone in the Borough of Mount Ephraim in June 1973.

2. From its inception, defendant exposed for sale adult books, magazines and paraphernalia as well as having coin-operated movie peep shows.

3. In July 1976, defendant commenced offering live nude dancing.

* * *

5. Also in July 1976, defendant obliterated the legend from its existing, non-conforming sign without obtaining a permit.

6. The judge will view the defendant's activities in question on the stipulation that what he sees is substantially similar to what he would have seen on the dates alleged in the pending complaints."

any obligation it may have had of proving the validity of its legislative scheme. Counsel for the appellants and the State entered into a stipulation which it was agreed would give the courts all facts necessary to determine all issues presented, in order to resolve the litigation in toto. This stipulation was relied upon by the appellee, the trial courts, as well as the two appellate courts, to which this case has been previously presented.

The only issue which relates in any way to appellants' first question as presented to this Court is issue number 2 of the stipulation, "Is defendant's live nude dancing protected by the First Amendment?" The only relationship is that they both refer to the First Amendment, but beyond that they are substantially different from one another. The facts as stipulated were the only evidence of the issues that were stipulated.[14]

There was no burden on the prosecution of establishing facts to identify the State's interest or how it was served by the ordinance. The State was effectively deprived of that opportunity, if it was required, by the stipulation. There is nothing in the stipulation which would bring to mind the

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14. No agreement could be had with respect to factual statement number 4 concerning issue number 3 raising selective enforcement and testimony was produced by the appellants who voluntarily assumed the burden. Judge Schomer in the Municipal Court held that there was no selective enforcement. This holding was affirmed by Judge Deighan and adopted by him in the County Court, which was later affirmed by the Appellate Division of the Superior Court, for the reasons expressed by Judge Deighan. The Supreme Court of New Jersey declined to hear the matter and that issue has now been abandoned in this Court. Additionally, the municipal court judge under factual stipulation number 6 was to have viewed appellants' activity in order that findings with respect thereto could be included within the record. This was never accomplished as that court found that the issues could be resolved in the absence thereof.

appellants' first question presented to this Court so as to put the appellee on notice as to the nature of the State's burden assuming such a burden was on the State.

With respect to the second issue presented by the appellants, there is nothing to suggest that argument.[15] While the appellants set forth on page five as part of its procedural history the raising of the due process argument in its brief to the Municipal Court, this issue was not one of the seven issues stipulated by and between the parties. Because this issue was not raised below, no evidence upon this issue was produced.

The appellants have continued to raise these issues in many forms. Before this Court it appears as the second issue on page "i" of its brief. That issue is nowhere to be found in appellants' appeal papers and should not be entertained by this Court.

Should this Court, however, conclude that the burden was on the State and not obviated by the stipulation, then we turn to the next question.

IV.

The State has met any burden that may exist to show that the ordinance in question is not violative of the First Amendment.

The First Amendment serves to protect speech and other forms of expression. In *United States v. O'Brien,* 391 U.S. 367 (1968) at p. 376, the Court said "We cannot accept the view that an apparently limitless variety of conduct can be labeled speech

15. The filmed peep shows are films offered for sale by the appellants. Certainly, the patron can view the film prior to purchase the same way customers used to listen to recordings, and appellants' customers look through its books prior to purchase.

whenever the person engaging in the conduct can thereby express an idea." *O'Brien* was not dealing with commercial speech, which is subject to further restrictions than other forms of speech. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). Turning to the case at bar, live nude dancing, which is at best a form of commercial speech, can be viewed in the light of the First Amendment. In *Duran v. Salem Inn*, 422 U.S. 922 (1975), the Court indicated that nude dancing might be entitled to First Amendment protection under limited circumstances. This Court has never held that as a matter of law live nude dancing falls squarely within the protections afforded by the First Amendment.

Former Chief Judge Cohen of the District Court of New Jersey, in his opinion of *Starshock, Inc. v. Shusted*, 370 F. Supp. 506 (D. N.J. 1974), *reversed on other grounds*, 493 F. 2d 1401 (3rd Cir. 1976), was faced with the issue of "is nude interpretive dancing embraced within the guarantee of freedom of speech under the First Amendment to the United States Constitution." page 507. The court held at page 508:

> "Plaintiffs fail in their argument to note the significant distinction between speech and conduct. The public exposure of sex organs and nudity in this setting is not a matter of free expression. Rather these acts are conduct cognizable as a crime under the common law (citations omitted) and generally considered as having a reasonable relationship to the public welfare, and therefore, within the police power of the legislature."

The court further noted at page 509 that:

> "The United States Supreme Court has consistently recognized the distinction between

> conduct, which may be regulated by the State, and expression, which may not be interefered with except upon proof of obscenity, *Miller v. California,* 413 U.S. 15 (1973)."

Starshock clearly stands for the proposition that nude dancing is not within the First Amendment. Put simply, appellant's nude dancing is not speech; and hence is not entitled to the protections afforded speech.

Assuming that live nude dancing is protected by the First Amendment, the Borough's ordinance satisfies the criteria of the *O'Brien* test. In *O'Brien,* this Court found that the burning of a draft card was speech; assuming that live nude dancing is also speech, there are four tests that must be satisfied for a municipality's ordinance to pass muster. These tests are that:

(1) The ordinance is within the power of the government;

(2) The ordinance furthers the governmental interest;

(3) The government's interest is unrelated to suppression of speech;

(4) The ordinance places no burden on the First Amendment beyond that which is necessary.

The appellants concede points 1 and 3 of the *O'Brien* test. The appellants dispute that the ordinance furthers any important or substantial governmental interests and that there is an impermissible burden on the First Amendment beyond that which is reasonably necessary.

The issue whether the ordinance in question furthers a governmental interest is actually the same issue as whether this

ordinance passes analysis under substantive due process. An inquiry as to whether a governmental interest is being furthered necessarily is one of fact and not of law.

The evils that the Borough seeks to avoid by prohibiting appellants' use may well be the same ones that were sought to be overcome in *California v. LaRue,* 409 U.S. 109 (1972). At page 111, the Court indicated that the customers of the liquor serving establishment in that matter were engaging in oral copulation, public masturbation, prostitution, rape and attempted rape in and about the premises. It can easily be seen that if there were no live female entertainers that there would be no possibility of these entertainers rendering the "services" that were sought to be avoided in *LaRue.*[16]

In *Young v. American Mini Theaters, Inc.,* 427 U.S. 50 (1976), it was held that "reasonable regulations of the time, place and manner of protected speech, where those regulations are necessary to further significant governmental interest are permitted by the First Amendment."

With respect to this ordinance posing an impermissible burden upon the First Amendment, it is submitted that there is no such burden since people are able to get the message elsewhere in other communities. Furthermore people can get the message right at the location of the appellants in the form of film and other devices available there. The only thing that cannot be gotten at the appellants' location is live entertainment, but certainly the message that the appellants hope to deliver to the public is amply distributed at appellants' present location.

Appellants' entertainment is available elsewhere thus protecting dissemination of information which may be protected

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16. *See also,* footnote 7, *supra.*

by the First Amendment. The First Amendment is designed to afford protection to speech so that ideas can be circulated in the marketplace. The appellee's ordinance does not prohibit all entertainment, but only live entertainment. The "message" that the appellants desire to spread can not only be found in other surrounding communities, but can be found in the appellants' premises in the form of films.[17] The appellants' arguments concerning the alleged lack of rational distinction between movies and live entertainment only highlights the availability of another form of entertainment through the cinema media.[18] If anything, this proves why the First Amendment is not being hindered, but that the First Amendment is being protected through an alternative means of disseminating the information.[19]

Accordingly, even on the present record, it must be found that the ordinance imposes no restriction on the rights of anyone to convey his message or on the rights of any one to receive it. Since the message can be conveyed or received at this location in another manner and at other locations in the same manner, this ordinance, as was the ordinance in *Young,* is merely a reasonable time, place and manner regulation.

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17. Appellee's contentions are further bolstered by looking at the matter that is presently being sold, that is, books, magazines, films and sexual paraphernalia. What is being regulated is not speech but the use of land in the municipality.

18. Here appellants contend that its permitted film entertainment is indistinguishable from its live entertainment. "The two forms of amusement are so similar in their operation and character as to be for the purposes of zoning, indistinguishable." (Appellants' Brief, page 31).

19. Additionally, the ordinance meets the three-prong test set forth in *Metromedia v. San Diego.* That test is as follows: (1) the restriction of speech does not seek to suppress the content of any message; (2) the ordinance serves significant government interest and is unrelated to the suppression of any speech; (3) the ordinance leaves open adequate alternative means of communication.

The ordinance does not work any prior restraint in contravention of the First Amendment. As now presented by the appellants, the issue is broader than simply whether appellants' activity, live nude dancing, is protected by the First Amendment in that the appellants have now raised prior restraints.[20] Even if this ordinance is held under the light of the law concerning prior restraint, it will pass muster.

In a sense, any law that deals with regulation is a law which contains prior restraints. The appellants would have this Court believe that the municipality's power to regulate is in this case tantamount to the municipality's creation of a prior restraint.

Unquestionably, a municipality in the exercise of its zoning powers can impose limits as to the place of a given use. For example, a municipality may regulate in what zones a movie theater is allowed. It may add as conditions such things as parking controls, rules of ingress and egress and hours of operation. All of these forms of regulation would be permissible under a zoning ordinance. If an applicant desired to have his business vary from the promulgated rules, he would have to seek a variance. So in a sense this variance requirement would be a prior restraint, however, it certainly is permissible and necessary in order to preserve the integrity of this zoning scheme. It is precisely this type of municipal activity that the appellants contend is a impermissible prior restraint. With this proposition, the appellee vigorously disagrees.[21]

It is further contended that the ordinance is void for vagueness. Appellee cannot agree with this proposition. There

20. Again, it must be noted that this issue as raised by the appellants was not raised in the trial court below.

21. Parenthetically, it should be noted in the context of prior restraint that the appellants offered live entertainment, and this action only arose after such entertainment was offered. Accordingly, there can be no question that the Borough of Mount Ephraim did not prevent the initial acts of the appellants.

can be nothing less vague than knowing when one is utilizing a specific piece of property for the commercial exploitation of live entertainment.

Additionally, appellants place into question the motivation of the Borough in its prosecution. Considering that appellee permitted appellants indistinguishable use from 1973 to the present and has attempted to exercise its authority only with respect to the live entertainment should be sufficient to demonstrate appellee's good faith.

Accordingly, any burden which was properly appellee's to shoulder and which has not been obviated by the stipulation, has been met.

V.

If the State has not met its burden what action should this Court take.

The appellee admits that the burden of proof is always upon the State to prove each and every element of a criminal offense. However, as previously discussed, this does not mean that the State must prove the constitutionality of its legislative scheme.

If in the present situation, the State was required to prove the validity of its legislative scheme by reason of the First Amendment, and that burden was neither obviated nor met by virtue of its omission rather than its failure of offered proofs, should this Court find the ordinance unconstitutional or remand the matter for further findings of fact.[22] Even if this Court feels constrained to reverse, it should do so by entering a finding of

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22. It is believed by appellee that the procedure would be permissible. *State v. Barnes*, 84 N.J. 362 (1980).

not guilty without impairing the ordinance under which the appellants were convicted. In no event would a finding of unconstitutionality be warranted in the absence of a complete factual record.

CONCLUSION

Each municipality is not required under the Federal Constitution to devote land for the commercial exploitation of activity protected by the First Amendment. The failure to include such activity in the recitation of permitted uses, without more, does not render the zoning ordinance or State enabling legislation constitutionally infirm in the absence of a factual constitutional showing.

Land use regulation is so related to the health, safety, morals and general welfare as to supply the rational nexus between the police power and the regulation. The failure to include within the ordinance uses customarily devoted to live entertainment is neither unreasonable, arbitrary or capricious. The burden of proof of the invalidity of the regulation is placed upon the appellants in a criminal prosecution. Whatever burden which the State may have had was obviated by the stipulation in this case and the State has proven that its regulation is a reasonable time, place and manner regulation as presented in *Young* and meets the *O'Brien* test. Accordingly, it is respectfully submitted that appellants' conviction be affirmed.

Respectfully submitted,

s/ ARNOLD N. FISHMAN
Attorney for Appellee

79-1640

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

JAMES F. SCHAD, 613 CORPORATION and
JULIETTE ANN DI LUCIANO,

Appellants,

v.

BOROUGH OF MOUNT EPHRAIM,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY *AMICI CURIAE*

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INTEREST OF AMICI*

The American Civil Liberties Union is a non-partisan organization of over 200,000 members, dedicated to defending the fundamental liberties guaranteed in the Bill of Rights; the ACLU of New Jersey is one of its state affiliates. Foremost among those liberties is freedom of speech, and the ACLU has represented literally thousands of individuals to defend freedom of speech against laws, and the arbitrary actions of officials, which limit the flow of information and freedom of self-expression the Amendment was enacted to secure.

The ordinance at issue here substantially abridges First Amendment

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*/ Both parties are forwarding letters consenting to the filing of this brief directly to the Clerk.

rights and affords local officials a broad discretionary power to eliminate activity which the First Amendment protects, all under the guise of "zoning". Because the ordinance, if upheld, would permit a drastic reduction of protection afforded by the First Amendment, amici submit this brief amici curiae.

INTRODUCTION AND SUMMARY OF ARGUMENT

Although the activity for which the Borough of Mt. Ephraim has punished Appellants by a $300.00 fine was live nude dancing, this is not a nude dancing case. As amici view it, the case presents no question regarding the extent of First Amendment protection to which such activity is entitled, or, if some sub-categories of dancing are afforded diminished protection, how the line between non-obscene

"bumps and grinds" and "Swan Lake" could be drawn.[1/] Nor does it present an opportunity to decide whether a state or municipality, by means of a narrowly drawn ordinance directed at nude dancing or other similar activity, could either regulate a category of protected activity such as "nude dancing" by zoning, or eliminate it altogether under threat of criminal penalties.

[1/] Amici believe that live dancing -- even barroom-type nude dancing -- is presumptively entitled to First Amendment protection, Doran v. Salem Inn., 422 U.S. 922 (1975); California v. LaRue, 409 U.S. 109 (1972); see also Young v. American Mini Theatres, 427 U.S. 310 (1976), and are aware of no test other than that of Miller v. California, 413 U.S. 15 (1972) by which to distinguish dancing entitled to full protection and other dancing. In any event, Mt. Ephraim has not enacted the type of ordinance or made the findings which could even conceivably justify application of the analysis in Young v. American Mini Theatres to petitioner's activity.

Mt. Ephraim has not enacted a narrowly drawn ordinance, like the ordinance at issue in Young v. American Mini Theatres, 427 U.S. 50 (1976), to regulate the places at which "adult entertainment" may take place without significantly restricting access to it or eliminating it altogether. Instead, Mt. Ephraim has enacted a zoning ordinance that completely eliminates from the entire town, on penalty of criminal prosecution, all live entertainment, including (so far as we can tell) the presentation of Hamlet, the reading of poetry, singing of political songs by a folk balladeer, enactment of a play like MacBird, or a chamber music group playing a Mozart Quartet.

The ordinance is overbroad, vague,

and irrational. It prohibits activity protected by the First Amendment without any showing that the proscription is essential to further compelling governmental interests. No court has construed the ordinance so as to give fair warning of various kinds of "live entertainment" -- say, a bridge game at home, or Bingo games in a store after hours, or a barbershop quartet singing in an office for a Christmas party -- that the plain language of the ordinance would forbid. Nor is there any indication in the record of any governmental interest that could rationally justify an ordinance permitting adult bookstores and film-strip peep shows, but forbidding peep-shows with a live dancer behind a glass screen, or more generally permitting filmed but not live entertainment.

Accordinlgy, the judgment of the

court below must be reversed. In the alternative, because that court did not address the substantial First Amendment questions raised by a zoning regulation completely eliminating from a community permitting commercial uses substantial categories of First Amendment protected activity, the judgment below should be vacated and the case remanded for further consideration and development of a fuller record on which to decide the questions raised.

ARGUMENT

I. MT. EPHRAIM'S ABSOLUTE BAN ON ALL "LIVE ENTERTAINMENT IS OVERBROAD IN VIOLATION OF THE FIRST AMENDMENT.

Although in form a zoning ordinance, the New Jersey Courts have construed Ordinance 99-15B as a proscription of all

"live entertainment", punishable by criminal fines, anywhere in the entire municipality. See the Opinion below, Appendix to the Jurisdictional Statement, (hereafter "J.App.") at 4a, 6a, 7a. The ordinance cannot be construed as a reasonable time, place or manner regulation, because it permits live entertainment in Mt. Ephraim at no time, in no place, and in no manner.[2/] See, e.g., Consolidated Edison v. Public Service Commission, 65 L.Ed.2d 319, 327-28; compare Young v. American Mini Theatres, supra, at 62-63 (zoning, but not elimination, of "adult entertainment").

[2/] The prior non-conforming uses grandfathered by the Court below are of no analytical significance in this respect.

Where an ordinance forbids and threatens criminal punishment for activities presumptively protected by the First Amendment, the government can prevail only by showing that the ordinance is narrowly drawn and is no broader than necessary to further a compelling governmental interest. United States v. Robel, 389 U.S. 258 (1967); Shelton v. Tucker, 364 U.S. 479 (1960); Consolidated Edison v. Public Service Commission, supra. [3/] Legislation in the First Amendment area must be precisely and

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[3/] Although zoning ordinances ordinarily aim at governmental interests other than the suppression of speech, and would therefore be subject to the somewhat less strict analysis of United States v. O'Brien, 391 U.S. 367 (1968), for regulations applied to mixed speech and "non speech conduct" which have only an "incidental" limitation on First Amendment freedoms, the present ordinance is subject to the stricter test.

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narrowly drawn to minimize "the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." NAACP v. Button, 371 U.S. 415, 433 (1963).

The ordinance applied against Appellants fails to comply with the above principles, and is consequently overbroad

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A zoning ordinance which permits the variety of commercial uses the ordinance permits here, and yet proscribes "live entertainment", does not further "a governmental interest unrelated to the suppression of free expression" under O'Brien. To the contrary, Mt. Ephraim's interest in banning "live entertainment" is directly related to the suppression of free expression. See Young v. American Mini Theatres, 427 U.S. at 81 n.4 (Powell, J., concurring). Nor has Mt. Ephraim properly identified the "non speech elements" of the proscribed dancing which it could justifiably regulate, as did Detroit in Young v. American Mini Theatres. Compare O'Brien at 376.

on its face. Grayned v. City of Rockford, 408 U.S. 104, 114 (1972); Gooding v. Wilson, 405 U.S. 158 (1972); Village of Schaumberg v. Citizens for a Better Environment, 63 L.Ed.2d 73 (1980). The overbreadth of the ordinance, prohibiting all live entertainment, is both "real and substantial" within the meaning of Broadrick v. Oklahoma, 413 U.S. 601 (1973). Indeed, it is nothing less than extraordinary. The New Jersey Courts have not attempted to limit the ordinance in any way, as for example to entertainment which could be held obscene, see Miller v. California, supra, or to entertainment which poses special aesthetic or social probelms, see Young v. American Mini Theatres, supra. The production of all plays, the reading of all poetry, all dancing, including Swan Lake, all live political satire, and all folk singing are

forbidden, irrespective of political content. All of these activities are entitled to full First Amendment protection. See, e.g., Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975)(theater); Joseph Burstyn, Inc., v. Wilson, 343 U.S. 495 (1952) (movies); Schact v. United States, 398 U.S. 58 (1970)(political street theater); Doran v. Salem Inn, 422 U.S. 922 (1975)(dancing).[4/]

On this record, Mt. Ephraim has not carried its burden of showing that proscription of all live entertainment is necessary to serve compelling governmental interests. The Court below did not attempt

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[4/] The Court has recently re-emphasized that the First Amendment protects not only political speech but also "self expression". Consolidated Edison v. Public Service Commission, 65 L.Ed.2d 319, 326 n.2 (1980).

to identify any governmental interest to support the distinction between permitted First Amendment uses (motion pictures and filmed performances of dancing, plays, poetry readings, ballet, folksinging, and so forth) and prohibited live performances. 5/ Because the lower court did

5/ In this respect, the case is like Carey v. Brown, 65 L.Ed.2d 263, where the Court noted that any interest which justifies a proscription on political speech must apply a fortiorari to labor speech, and since the community did not so apply it, the interest was held not compelling. 65 L.Ed. 2d at 272-273. Here, any interest that could justify proscription of all live entertainment would necessarily apply to various permitted uses, e.g., peep shows, movies and filmed performances, restaurants, liquor stores, and so forth. Having permitted these, Mt. Ephraim may not claim that the interests supporting its zoning regulations are "compelling" as regards live entertainment.

not even identify such an interest, it did not require Mt. Ephraim to show how the ordinance was necessary to serve such an interest. Any concerns Mt. Ephraim might have had concerning fire codes, the hours its police must manage traffic, and parking and traffic congestion, could have been served by a more narrowly drawn ordinance imposing time, place and manner restrictions, rather than the blunderbuss approach taken here. 6/

6/ This case does not require the Court to decide whether the police power, under which communities have a large measure of discretion to zone, could support a non-vague ordinance restricting some forms of live entertainment from particular areas in a multi-zoned community, or even completely from a wholly residential community (for example, banning the commercial presentation of plays from a residential neighborhood.) Even assuming arguendo that such

(footnote cont'd on next page)

Accordingly, the ordinance is unconstitutionally overbroad.

II. MT. EPHRAIM'S ZONING ORDINANCE IS UNCONSTITUTIONALLY VAGUE IN VIOLATION OF THE FIRST AMENDMENT.

Both on its face and as applied, the challenged ordinance is unconstitutionally vague.

The general form of the ordinance -- specifying certain permitted uses, and prohibiting "all uses not expressly permitted" -- plainly does not indicate whether

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a zoning ordinance would be constitutional, this case presents the quite different fact pattern the Court indicated would be plainly unconstitutional in Young v. American Mini Theatres -- the total elimination from a community with commercial zones of material presumptively protected by the First Amendment. See Young, supra, at 70, 72 n.35; id. at 78-79 (Powell, J., concurring).

activities like singing, or dancing, or political theater, may occur in "permitted uses" such as "offices" or "banks" or "bookstores". Although the New Jersey Court has attempted to remedy this problem by explicitly declaring that the ordinance bans all "live entertainment", a construction binding on this Court, that construction does not provide the necessary guidance of what is permitted and proscribed in an area touching First Amendment freedoms. May a permitted restaurant have a strolling accordian player? Or a live musician in a back room whose music is piped into the dining area? May a permitted office invite a barbershop quartet to sing at a Christmas Party? May a permitted bookstore ask a poet to read his poetry, or autograph his books? May a permitted movie theater invite a director to discuss his movie for the audience after a screening,

or invite the star of the movie to appear and greet the audience? Is bridge, or bingo, or Little League baseball "live entertainment"? Is a fund-raising speech by Howard Jarvis, or William Kuntsler? Or Mark Russel's satiric comedy routine? Is singing by Peter, Paul and Mary "live entertainment," even if presented at a fund-raiser for a local political candidate?

The answer to all of these questions is unclear. The First Amendment does not permit a criminal fine to be imposed under a statute which does not provide fair warning of what is, and is not permitted. Vague statutes present an unacceptable risk that individuals will be unclear as to what is permitted and forbidden, and as a result will forego activity that is protected by the First Amendment. See, e.g., Hynes v. Mayor of Oradell, 425 U.S. 610, 620 (1976);

Smith v. Goguen, 415 U.S. 566, 573 (1974); Smith v. California, 361 U.S. 147, 151 (1959). Whenever greater precision are possible, convictions for protected First Amendment activity under vague statutes is set aside.

Although it is difficult to suggest more precise wording for the ordinance because we are not told what New Jersey's interest is, any conceivable compelling interest could have been served by a far less sweeping and uncertain ordinance. Even if we assume that Mt. Ephraim's interest was the interest in Young v. American Mini Theatres -- a conclusion this record could not support -- the Detroit ordinance is a model of precision compared with the ordinance here. Although the First Amendment might well, on substantive grounds, bar proscription of "nude dancing", at

least such an ordinance would not be impermissibly vague. By contrast, this ordinance provides no clear warning of what is, and is not, punishable by the criminal law.

Although vagueness is usually analyzed by viewing the ordinance on its face, the particular facts of this case emphasize the vagueness of the ordinance and the unfairness of applying it to petitioner.

Although the ordinance did not specifically permit the sale of films of a sexually explicit nature, Appellants had long offered such films to their customers without being cited for non-conforming usage of their property. Moreover, Appellants later applied for, and received, licenses for the operation of several viewing devices for the exhibition of sexually explicit films, known in the colloquial as

"peepshows", again even though the ordinance did not specifically permit this usage. Under the circumstances, Appellants made the quite logical assumption that entertainment of a sexually frank nature did not violate the ordinances. Coupled with this was their realization that local night clubs had been offering live entertainment for years pre-dating the enactment of the ordinance in question.

Only after installation of devices for viewing live nude dancers did Appellee determine that Appellants were in violation of the zoning ordinances. The prior inconsistant actions of borough officials and the vague terms of the ordinance could not logically have put Appellants on notice that the exhibition of filmed nude dancers was so different from the exhibition of live nude dancers that the ordinance would

allow one and criminally punish the other.[7/]

These facts highlight one of the central vices of a vague statute, the unfettered discretion vague statutes provide to officials who execute the laws. Vague statutes are subject to capricious enforcement. As this Court has noted:

> Where...there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law.
>
> Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972).

[7/] In this respect, the case is quite different from Young v. American Mini Theatres, supra, where the application of the ordinance to the respondents was clear. See 427 U.S. at 58-61. Moreover, here, but not in Young, the statute is vague not only as to material "on the borderline between pornography and artistic expression" but throughout the range of protected activity. See id.

Armed with a statute which could be as elastic or restrictive as they felt the occasion demanded, borough officials may well have applied the ordinance to achieve an impermissible content-oriented censorship.

Accordingly, the conviction must be reversed because the ordinance is unconstitutionally vague.

III. MT. EPHRAIM'S ZONING ORDINANCE, WHICH PERMITTED PETITIONER TO EXHIBIT FILM-STRIP PEEP SHOWS BUT PROHIBITED LIVE PEEP SHOWS, DOES NOT RATIONALLY AND SUBSTANTIALLY ADVANCE ANY LEGITIMATE GOVERNMENTAL INTEREST, IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS.

Although it is clear that municipalities have the authority, through the police power, to enact and enforce zoning ordinances to protect the public health, safety or general welfare, Penn Central Transportation

Co. v. City of New York, 438 U.S. 104 (1978); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), the Court has held that zoning laws constitute a "taking", and accordingly violate the Fifth Amendment and due process clauses, if they do not "substantially" and rationally advance legitimate state interests. Agins v. City of Tiburon, 65 L.Ed.2d 106, 112 (1980); Nectow v. Cambridge, 277 U.S. 183 (1928); Euclid v. Ambler Realty Co., supra.

The goals for which a community may zone are not narrowly constricted by the Constitution. For example, the Court has upheld zoning regulations which zone out industrial usage to create a purely residential area. Euclid v. Ambler Realty Co., supra. This Court has found that there is a valid state interest served in leaving

areas of land undeveloped, Gorieb v. Fox, 274 U.S. 603 (1927), in limiting the height of buildings within a designated area, Welch v. Swasey, 214 U.S. 91 (1909) and in preserving the aesthetics and character of a given neighborhood. New Orleans v. Dukes, 427 U.S. 297 (1976); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). However, the basic requirement of rationality, of substantial relationship to a legitimate state interest, remains. A community must have some legitimate reason to zone as it does, and its zoning must further that interest. Nectow v. Cambridge, supra. Zoning which is irrational -- which permits red houses and forbids brown houses without justification, for example -- violates the due process clause. Similarly, unless some legitimate state interest is rationally advanced by prohibiting "live entertain-

ment", including the live peep show for which petitioners have been punished, while permitting filmed peepshows, the ordinance is unconstitutional.[8/]

There is no rational distinction between the sexually explicit filmed conduct exhibited on Appellants' premises to paying customers permitted by the ordinance and the exhibition, through a viewing glass,

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[8/] So long as the categorical distinctions a statute makes are rational, the due process clause is not necessarily offended because a statute is irrational as applied in a particular case. See generally O'Connor v. Board of Education, 49 U.S.L.W. 3551, 3552 n. 4 (Stevens, Circuit Justice). The point here is not that this ordinance is per se irrational as applied to prohibit live dancing, but that the categorical distinction between live dancing and filmed dancing (or between live entertainment and other entertainment) does not rationally advance any state interest identified in this record.

of live dancers engaging in identical conduct before the same customers. Both forms of entertainment would attract approximately the same volume and character of clientele. Differentiating between one form of entertainment and the other in the context of this case is completely irrational and constitutionally impermissible; it does not substantially advance any state interest.

This is not a case, like California v. LaRue, 409 U.S. 109 (1972) where disruptive and lewd conduct occurred when performers were allowed to come into direct contact with the viewing audience. Here, by contrast, the performers were separated from the viewers by a glass window, eliminating the possibility of such disruptive or lewd behavior. Nor can Mt. Ephraim rely, as did California, on the Twenty-first Amendment to support the distinction it

makes, because Appellants' premises did not have a liquor license.

Any conceivable interest sufficient to regulate the live entertainment offered by Appellants would have applied to film-strip peep shows as well, and to a wide variety of other conduct permitted in Mt. Ephraim's commercial zone. The distinctions made by the Mt. Ephraim ordinance are not sufficiently rational to withstand Appellants' due process challenge.

IV. IN THE ALTERNATIVE, THE COURT SHOULD VACATE THE JUDGMENT BELOW AND REMAND THE CASE FOR CONSIDERATION BY THE NEW JERSEY COURTS OF APPELLANTS' FIRST AMENDMENT CLAIMS.

Amici believe that the conviction below violates the First, Fifth, and Fourteenth Amendments, and must be reversed. Inexplicably, the court below did not even

address the merits of the First Amendment claims, concluding without reasoning that "First Amendment guarantees are not involved in this matter." J.App. 8a; see also J.App. 6a and 9a. If this Court does not reverse on the merits, it should at least remand for fuller development of the record and examination by the New Jersey courts of Appellants' First Amendment claims.

The Court below seems to have thought that, by placing this case in a zoning pigeonhole, all First Amendment considerations were rendered irrelevant. Its judgment may have been based on the general rule that communities are free within wide limits to zone in or out particular uses, and that every community need not permit every conceivable use. See, e.g., Belle Terre v. Boraas, supra.

Amici have argued above that, notwithstanding these general principles of the law of zoning, some First Amendment uses such as plays, poetry readings, folk-singing and the like, cannot completely be zoned out of a community, at least where that community permits commercial uses. Compare Hague v. CIO, 307 U.S. 496 (1939). But even if we are wrong, it can hardly be doubted that if an entire state, or a large city, or every community in a county or region, zoned out such First Amendment activity, the First Amendment would be violated.[9/]

[9/] Even as to non-obscene erotic materials, the Court has held that the First Amendment does not tolerate "suppression" or significant "restrictions" on access, Young v. American Mini Theatres, supra, at 70, 72 n.35; id., at 78-79 (Powell, J., concurring). Elimination of all "live entertainment" would a fortiorari be unconstitutional.

At what point an otherwise permissible zoning scheme's prohibition of live entertainment or other First Amendment uses would become unconstitutional is not an easy question to answer. The present record does not even begin to afford an appropriate basis for exploring the relevant considerations. Accordingly, if the Court does not reverse the judgment below for any of the three reasons we have urged, it should vacate and remand for development of a mere complete record and for consideration by the New Jersey courts of the important First Amendment questions raised.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed. Alternatively, the Court should vacate the judgment and remand the case for further consideration consistent with the Court's opinion.

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Dated: New York, New York
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No. 79-1640

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1979

James F. Schad 613 Corporation
and Juliette Ann DiLuciano,
Petitioners,

v.

Borough of Mount Ephraim,
Respondent.

ON APPEAL FROM THE
SUPREME COURT OF NEW JERSEY

BRIEF OF MORALITY IN MEDIA, INC. AS AMICUS CURIAE

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BRIEF OF MORALITY IN MEDIA, INC. AS AMICUS CURIAE

INTEREST OF AMICI

Morality In Media, Inc. as Amicus Curiae, files this brief in this case

which is before this honorable Court on the merits, under the provisions of Rule 36.2.

Morality in Media, Inc., is a New York not for profit inter-faith charitable Corporation, organized in 1968 for the purpose of combatting the distribution of obscene material in the United States. This organization, now national in scope, has affiliates in seven states. It corresponds eight times a year with over 30,000 recipients of its newsletter located in every state of the United States. Its Board of Directors and National Advisory Board are composed of prominent businessmen, clergy and civic leaders. Its national headquarters is located at 475 Riverside Drive, New York, New York 10115.

The President of Morality in Media,

Inc., is Reverend Morton A. Hill, S.J. In 1968 Father Hill was appointed to the Presidential Commission on Obscenity and Pornography. He, along with Doctor Winfrey C. Link, produced the "Hill-Link Minority Report of the Presidential Commission on Obscenity and Pornography".[1]

Morality in Media files this brief supporting the position of the Borough of Mount Ephraim because it believes that the decision in this matter will have a significant impact upon the quality of life in small suburban and rural communities throughout the United States.*

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1. The "Hill-Link Minority Report" was cited by this honorable Court in Kaplan v. California, 413 U.S. 115, at 120 n.4 (1973); Paris Adult Theatre I. v. Slaton, 413 U.S. 49, at 59 n.7 and n.8 (1973).

*/Both parties are forwarding letters consenting to the filing of this brief directly to the Clerk.

SUMMARY OF ARGUMENT

I.

Amicus initially argues that the police power is the constitutional source for the ordinance - that this power is a broad one in the Zoning Area and extends to many values deserving of protection including family values, youth values, morals and the prevention of neighborhood deterioration, all of which affect the "Quality of Life" in the community. It then goes on to show that certain types of exclusionary zoning have been upheld by this Court and that many courts have held that not all commercial uses need be accommodated in a community if the ones accommodated at locations within the community are reasonably related to the immediate needs of its inhabitants, are not arbitrary, and the other important

needs of the residents can be accommodated in the neighboring communities or areas, viz., the so called "Community at Large". Amicus opines that the appellant should have the burden of proving that these other needs are not substantially met in that Community at Large. Finally, Amicus points out that the trier of the fact has determined at the trial level that the ordinance is a valid exercise of the police power.

II.

Amicus further contends that the restraint here is a content neutral time, place, and manner restraint. As such, it does not violate the First Amendment. While at first blush the ordinance does not appear to deal with time, place, and manner, the effect is such when we examine its restrictions in relation to

the "Community at Large". Amicus concludes that under such circumstances the rationale of Young v. American Mini Theatres is dispositive of arguments based on infringement of First Amendment rights.

ARGUMENT

I.

THE ORDINANCE OF THE BOROUGH OF MOUNT EPHRAIM IS A REASONABLE AND CONSTITUTIONAL EXERCISE OF THE POLICE POWER.

A. The police power is the constitutional source for Mount Ephraim's Zoning Ordinance Section 99-15B.

Zoning ordinances, to be valid,

> "Must find their justification in some aspect of the police power, asserted for the public welfare."[2]

B. The police power utilizing zoning is broad; it includes various values summed up in the phrase "Quality of Life".

The concept of the police power is broad. As Justice Powell has noted:

> "One-half century ago this Court broadly sustained the

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2. Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926).

> power of local municipalities to utilize the then relatively novel concept of land-use regulation in order to meet effectively the increasing encroachments of urbanization upon the quality of life of their citizens."[3]

The United States Supreme Court has often noted the broad reach of the police power:

> "An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts...
> "Public safety, public health, morality, peace and quiet, law and order - these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it...
> "It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as

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3. Young v. American Mini Theatres, 427 U.S. 50, 73 (1976), concurring opinion of Justice Powell.

carefully patrolled."[4]

It has also noted that the police power

> "Is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."[5]

An additional rationale for the application of the police power was given in the concurring opinion of Justice Powell in Young v. American Mini Theatres[6]:

> "The purpose of preventing the deterioration of commercial neighborhoods was certainly within the concept of the public welfare that defines the limits of the police power."

In addition, Justice Stevens stated for the majority in Young v. American

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4. Berman v. Parker, 348 U.S. 26, 32-33 (1954).
5. Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).
6. 427 U.S. 50, 75 (1976).

Mini Theatres[7]:

> "The city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect."

In Agins v. City of Tiburon,[8] this Court, in upholding a residential zoning restriction challenged as an unconstitutional taking in violation of the Fifth and Fourteenth Amendments said:

> "The specific zoning regulations at issue are exercises of the city's police power to protect the residents of Tiburon from the ill-effects of urbanization. Such governmental purposes long have been recognized as legitimate."

Finally, in Euclid v. Ambler Realty Co.,[9] the Court made the following comments on the right of the community

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7. 427 U.S. 50, 71 (1976).
8. ___ U.S. __, 65 L.Ed. 2d 106, 112 (1980).
9. 272 U.S. 365, 386-387 (1926).

to preserve its own character:

> "With the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities."

C. Certain types of exclusionary zoning have been upheld previously by the Supreme Court.

In Euclid v. Ambler Realty Co., supra, a zoning ordinance was upheld by the United States Supreme Court which excluded from certain zones all industrial establishments. The Court said

> "The exclusion is in general terms of all industrial establishments...The restrictive provisions of the ordinance in this particular may be sustained upon the principles applicable to the broader exclusion from residential districts of all business and trade structures...
> "[Euclid's] governing authorities, presumably representing a majority of its

> inhabitants and voicing their will, have determined, not that industrial development shall cease at its boundaries, but that the course of such development shall proceed within definitely fixed lines."[10]

D. Many courts have held that not all commercial uses need be accommodated at localities within the community if the ones accommodated are reasonably related to the immediate needs of the inhabitants and other needs may be accessible in the "community at large."

In Valley View Village v. Proffet,[11] the Sixth Circuit upheld a single use type zoning ordinance, saying:

> "Traditional concepts of zoning envision a municipality as a self-contained community with its own residential, business and industrial areas. It is obvious that Valley View, Ohio, on the periphery of a

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10. 272 U.S. 365, 388-389 (1926).
11. 221 F.2d 412, 418 (6th Cir. 1955).

> large metropolitan center, is not such a self-contained community, but only an adventitious fragment of the economic and social whole. We cannot conclude as a matter of law that an ordinance which places all of the area of such a village into a residential district is per se arbitrary and unreasonable, with no substantial relation to the public health, safety, morals or general welfare. It would appear contrary to the very purposes of municipal planning to require a village such as Valley View to designate some of its area for business or industrial purposes without regard to the public need for business or industrial uses. The council of such a village should not be required to shut its eyes to the pattern of community life beyond the borders of the village itself. We think it is not clearly arbitrary and unreasonable for a residential village to pass an ordinance preserving its residential character, so long as the business and industrial needs of its inhabitants are supplied by other accessible areas in the community at large."

Similarly, in McDermott v. Village

of Calverton Park,[12] a zoning ordinance was challenged which did not (with minor exceptions) provide for commercial uses and limited the use of land to one-family dwellings. The Court noted:

> "There can be no doubt that the desired rezoning would not benefit any resident of the village except plaintiff. This for the reason that the services likely to be offered in the proposed shopping center are already available a short distance away."

In Reynolds v. Barrett,[13] the court had before it a zoning ordinance of a primarily residential community. In ruling that the ordinance was generally valid, the court said that the City of Piedmont

> "Is entirely surrounded by the City of Oakland in which

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12. 454 S.W.2d 577, 583 (Mo. 1970).
13. 12 Cal. 2d 244, 249 (1938).

> are located many business houses which maintain frequent and adequate delivery service to all parts of Piedmont... The people of the City of Piedmont have shown a determined effort to keep their city a residential city. This they have the legal right within constitutional limits, to do."

Finally, in Cadoux v. Planning & Zoning Commission, [14] the Connecticut Supreme Court upheld a zoning ordinance limiting land use to residential and farming uses throughout the municipality. The Court said:

> "The town of Weston is on the periphery of other larger metropolitan centers."

The situation of the Borough of Mount Ephraim is similar to these cases in which the challenge to the exclusionary zoning ordinances of small communities

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14. 162 Conn. 425, 429, cert. denied 408 U.S. 924 (1972).

were challenged. Mount Ephraim is a community of limited size.[15] Nothing indicates that live entertainment of the type respondents seek to bring in is not available in a neighboring location. Mount Ephraim could exclude all commercial uses but has chosen to exclude only certain uses. It has chosen to be less exclusive than the ordinances upheld above.

Valley View and Belle Terre tell us that Mount Ephraim has the right under its police power to preserve its residential character so long as the business and industrial needs of its inhabitants are supplied by other

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15. The Court could and should take judicial notice of the New Jersey statute (1926 N.J. Laws Chapter 82), setting forth the boundaries of Mount Ephraim; cf. Lamar v. Micou, 114 U.S. 218, 223 (1885).

accessible areas in the community at large.

E. The trial court found that Mount Ephraim's zoning ordinance was a reasonable exercise of the zoning power.

Judge Deighan, in the trial de novo in the Camden County Court, found that the ordinance was a reasonable exercise of the police power:

> "There has been no distinction without reason by the Municipality and ... the permitted uses under the Zoning Ordinance is a reasonable exercise of police power and ... the Zoning Ordinance is not directed to any infringement on the constitutionally protected rights. Live entertainment is simply not a permitted use in any establishment...."[16]

The cases establish that the rule of reasonableness is applied to land-use restrictions:

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16. Petitioner's Brief for Certiorari, Appendix, 12a.

> "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control... The reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[17]

Examination of the uses permitted by Section 99-15B of the ordinance shows that these uses are reasonably related to the normal needs of the inhabitants of the Borough of Mount Ephraim and that their delimitation is not arbitrary. The ordinance satisfies the Borough's needs while protecting its residents "from the

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17. Euclid v. Ambler Realty Co., 272 U.S.365, 388, 395(1926); see also Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974).

ill-effects of urbanization," to use this Court's phrase in Agins, supra.

F. Conclusion

The Borough of Mount Ephraim, in permitting only certain uses, has acted with due regard to the public needs and with due regard for the lack of public need for permitting the location of uses not permitted within its limited boundaries. The burden of proof that these needs are not met in surrounding communities should be on the appellant. Zoning Ordinance Section 99-15B represents a legitimate exercise of the zoning power.

II.

THE BOROUGH OF MOUNT EPHRAIM ZONING ORDINANCE IS A TIME, PLACE, AND MANNER RESTRICTION.

It is also submitted that Mount Ephraim's zoning ordinance is a content-neutral, time, place, manner restriction

as was approved by the Court in Police Department of Chicago v. Mosley,[18] in the context of a picketing ordinance. As such, it does not violate the Equal Protection Clause of the Fourteenth Amendment. Although the Mosley ordinance was struck down, the Court made the following comment on valid time, place, and manner restrictions:

> "We have continually recognized that reasonable 'time, place and manner' regulations of picketing may be necessary to further significant governmental interests."

The Mosley Court has specified, however, that such restrictions must be content-neutral:

> "But, above all else, the First Amendment means that government has no power to

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18. 408 U.S. 92, 98 (1972).

> restrict expression because of its message, its ideas, its subject matter, or its content... Our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control..."[19]

The Mount Ephraim Zoning Ordinance, Section 99-15B, is obviously from its wording part of an overall planned commercial land-use scheme. As such, it is

> "Not directed to the control of specific land uses because of their potentiality for offense or harm, but toward the location of land uses within the community regardless of their lack of nuisance proclivities, based upon the needs and character of the community."[20]

The Borough of Mount Ephraim does not discriminate on the basis of the

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19. 408 U.S. 92, 95-96 (1972).
20. A.H. Rathkopf, 2 The Law of Zoning and Planning, Para. 17.02 [3] (4th ed. 1980).

content of speech. It is directed to land-use in a community of limited size.

Young v. American Mini Theatres[21] is directly applicable to the situation. Substitute the "Community at Large" concept for the City of Detroit and "Live Nude Dancing" for "Adult Bookstore" and one can readily say with Mr. Justice Stevens that

> "There is no claim that the distributors or exhibitors of adult films are denied access to the market or, conversely, that the viewing public is unable to satisfy its appetite for sexually explicit fare. Viewed as an entity, the market for this commodity is essentially unrestrained."

The Young Court also points out that the protection of such activities is less important to society than the protection afforded speech generally:

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21. 427 U.S. 50, 62 (1976).

> "What is ultimately at stake is nothing more than a limitation on the place where adult films may be exhibited."[22]

Justice Powell In Young summarizes his position by saying:

> "I view the case as presenting an example of innovative land-use regulation, implicating First Amendment concerns only incidentally and to a limited extent."[23]

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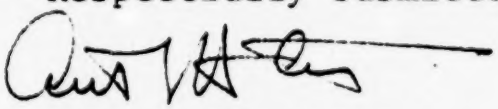
22. 427 U.S. 50, 70-71 (1976).
23. 427 U.S. 50, 73 (1976).

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed. The Borough of Mount Ephraim Zoning Ordinance Section 99-15B is a valid exercise of the police power which does not violate the First Amendment.

DATED: December 29, 1980

Respectfully submitted,



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